FATĀWĀ DĀR AL-‘ULŪM ZAKARĪYYĀ

VOLUME FIVE

Hadrat Muftī Radā’ al-Haq Sāhib

Translated by
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FOREWORD

بسم الله الرحمن الرحيم

الحمد لله وكفى، سلام على عباده الذين اصطفى، أما بعد:

All praise is due to Allāh taʿālā, volume five of *Fatāwā Dār al-ʿUlūm Zakarīyyā* is presented to the reader. This volume took quite some time. The delay was partly due to my many occupations and because of certain transaction rulings which had been set aside, and were being changed periodically.

Issues related to transactions are firstly complex, and secondly, the ʿulamā' of the Indo-Pak Subcontinent – especially of Pakistan – have many differences of opinion on the subject. There were times when I thought of deferring this volume completely, but when I thought deeply about it, I concluded that it should also be presented to the reader.

If the honourable readers and muftīs differ on some issues, they should read my fatāwā on the basis that they present another angle to the issue at hand. From the Urdu fatāwā, I quoted the fatwā of the mufti whose view was in line with my view, and I provided the reference for it.

The reader should not become restive with some of the lengthy quotations because this is inevitable when it comes to certain major issues.

It will be extremely ungrateful if I do not acknowledge the efforts of the students of our Dār al-Iftā' who assisted in obtaining the references for this and the other volumes. I pray to Allāh taʿālā to accept them for the path of knowledge and practice, and to inspire them with the good fortune of serving Dīn for as long as they live. Āmīn. Allāh willing, this effort of theirs is a milestone for them.

Maulānā Muftī Muẖammad Ilyās Shaykh Ṣāẖib needs to be congratulated for his untiring efforts in checking the references and providing additional references occasionally. He also did us the favour of arranging and compiling this book. I pray to Allāh taʿālā to reward him for his efforts. Āmīn.

I am indebted to the principal of Dār al-ʿUlūm Zakarīyyā, Maulānā Shabbīr Aẖmad Sālūjī Ṣāẖib, for providing all the ease to the Dār al-Iftā'.

Note: When it comes to matters pertaining to transactions, it is my view that – while remaining within the limits - the easiest option should be chosen. This, so that it is easy for everyone – the masses and the elite – in these trying times. It is especially important to bring the masses as close as possible to the Sharīʿah. When a strict and authoritarian stand is adopted, people sometimes become averse to Dīn and the Sharīʿah. Absolute knowledge is with Allāh taʿālā alone.

(Hadrat Muftī) Radā’ al-Haqq (Sāhib)-may Allāh pardon him.
Dār al-Iftā’, Dār al-ʿUlūm Zakarīyyā, South Africa
4 Shaʿbān al-Muʿazzam 1433 A.H.

INTRODUCTION

الحمد لله جاعل العلماء أنجماً للاهتداء زاهرةً، وأعلاماً للاقتداء ظاهرةً، وحجةً على الحق قاطعةً، ومحجةً إلى الصدق شارعةً، وصدوراً للفضائل جامعةً، وبدوراً في سماء الشريعة طالعةً، حمداً يدوم دوام جوده الفياض، ويبقى بقاء الجواهر لا الأعراض.

والصلاة والسلام على صاحب الملة الطاهرة، المؤيد من عند الله بالمعجزة الظاهرة، محمد خاتم الرسل وناسخ الملل، والرضوان على آله أئمة الهدىٰ، وصحبه مصابيح الدجىٰ، والرحمة على من تبعهم بإحسان، وعلى علماء الأمة في كل زمان ومكان. أما بعد:

By the grace of Allāh taʿālā, I have the joyous opportunity of presenting to you volume five of *Fatāwā Dār al-ʿUlūm Zakarīyyā*. This volume relates to an important department of Islam, viz. dealings and transactions.

Every Muslim ought to know that Islam is not confined to acts of worship. Man cannot assume that by carrying out the different acts of worship – e.g. salāh, fasting, zakāh, hajj, etc. – he has fulfilled the duty of practising on Islam. Allāh taʿālā orders us and requires from us to practise on Dīn in its entirety. There are several departments of Dīn, for example:

1. Beliefs.
2. Acts of worship.
3. Social relationships, marriage, etc.
4. Transactions.
5. Morals and ethics.
6. Punishments.

If one wants to wear the necklace of a believer and a Muslim, it will be essential to embrace all these departments into one's life. Just as salāh is fulfilled in the masājid, transactions related to buying and selling, lending and loaning, etc. are carried out in the business arenas, courts, offices and so on. When they are done in accordance with the

injunctions of the Sharīʿah, a person acquires the good fortune of both worlds.

Someone asked Imām Muhammad rahimahullāh: "You codified jurisprudence and wrote books on this subject. Did you not write anything on the subject of asceticism and Sufism?" He replied: "I wrote Kitāb al-Buyūʿ on this subject."

Imām Muhammad rahimahullāh replied in this manner to show that the religiosity of a person is ascertained at the time of transactions and dealings, and how he differentiates between the lawful and unlawful. When there is money and wealth in front of him, his abstinence and piety are distinguished from his greed and insatiability.

Abstinence is not restricted to wearing tattered and old clothes, eating dry bread and holding a rosary in one's hand. The greatest foundation of piety is abstaining from what is unlawful and earning lawful sustenance.

> Saintliness cannot be acquired from the garments of abstinence. If a person possesses nobility of the self, he will be abstinent.

Hadrat Abū Hurayrah radiyallāhu ʿanhu narrates the following statement of Rasūlullāh sallallāhu ʿalayhi wa sallam:

> اتق المحارم تكن أعبد الناس، وارض بما قسم الله لك تكن أغنى الناس. (رواه الترمذى: ٥٦/٢، ابواب الزهد)

> Abstain from unlawful things and you will be listed among the most ardent worshippers in Allāh's sight. Be happy and content with the sustenance which Allāh taʿālā decreed for you, and you will be the wealthiest of heart.

We conclude that seeking lawful sustenance and abstaining from the unlawful are indirect forms of worship.

Hadrat ʿAbdullāh ibn Masʿūd radiyallāhu ʿanhu said:

> أن رسول الله صلى الله عليه وسلم قال: طلب كسب الحلال فريضة بعد الفريضة. (كنزالعمال)

> Rasūlullāh sallallāhu ʿalayhi wa sallam said that seeking lawful sustenance is the second obligation after other obligations.

Although this Hadīth is weak, the Muslim community accepted it. Based on its acceptance, it is worthy of evidence and can be furnished as proof.

We learn from this Hadīth that seeking lawful sustenance – whether in the form of trade or farming, manufacturing or agriculture, employment or manual labour – encompasses all this. They are included in Dīn and are a part of it. Not only are they permissible, they are obligations. If a person remains idle in his house due to laziness, without bothering about his own wellbeing nor of his family, then he will be sinning and be eligible for severe punishment.

Rasūlullāh sallallāhu ʿalayhi wa sallam personally carried out these works. He tended to goats and sheep on the mountains of Makkah in exchange for a few *qīrāt*. He undertook two business trips to Syria. He engaged in agriculture on the outskirts of Madīnah. In fact, every Prophet used to earn his own living. Therefore, for a believer to seek lawful sustenance entails fulfilling worldly and Dīnī obligations. Rasūlullāh sallallāhu ʿalayhi wa sallam said:

> التاجر الصدوق الأمين مع النبيين والصديقين والشهداء.
>
> (رواه الترمذى)
>
> An honest and trustworthy businessman will be raised with the Prophets, the truthful and the martyrs.

On the other hand, those who cast aside the reins of the Sharīʿah and do business as their desires dictate to them, have no fear of Allāh taʿālā, and do not adhere to the principles of honesty and trustworthiness, then the following warning of Rasūlullāh sallallāhu ʿalayhi wa sallam applies to them:

> إن التجار يبعثون يوم القيٰمة فجاراً إلا من اتقىٰ وبر وصدق.
>
> (رواه الترمذى)
>
> On the day of Resurrection, the traders will rise as sinners except the one who was fearful [of Allāh], did good and was honest [he will be saved from disgrace and humiliation].

The businessman whose sole aim is to amass profits, who does not differentiate between the lawful and unlawful, does not adhere to any order of the Sharīʿah as regards business, is fully immersed in buying and selling – then Rasūlullāh sallallāhu ʿalayhi wa sallam refers to him as a *fājir* (a profligate, a liar, a shameless person).

Rasūlullāh sallallāhu ʿalayhi wa sallam also said: That trader is extremely unjust who takes false oaths merely to sell his goods. He blasphemes the pure and blessed name of Allāh taʿālā for paltry worldly gains. Such a trader destroys his worldly and Dīnī life.

No matter what, not doing transactions in line with the principles and rules of the Sharīʿah is synonymous to inviting the wrath and punishment of Allāh taʿālā.

While Allāh taʿālā made man bounden to the Sharīʿah, He accepts man's weakness. This is why He provides ease and relief in everything; and removes difficulty, hardship and inconvenience. There are many texts which bear testimony to this.

مَا يُرِيْدُ اللهُ لِيَجْعَلَ عَلَيْكُمْ مِّنْ حَرَجٍ وَّلٰكِنْ يُّرِيْدُ لِيُطَهِّرَكُمْ وَلِيُتِمَّ نِعْمَتَهُ عَلَيْكُمْ لَعَلَّكُمْ تَشْكُرُوْنَ.

Allāh does not want to impose any hardship on you but wants to purify you, and to complete His favour upon you so that you may be grateful.[1]

يُرِيْدُ اللهُ بِكُمُ الْيُسْرَ وَلَا يُرِيْدُ بِكُمُ الْعُسْرَ.

Allāh desires for you ease and does not desire for you hardship.[2]

يُرِيْدُ اللهُ أَنْ يُّخَفِّفَ عَنْكُمْ، وَخُلِقَ الْإِنْسَانُ ضَعِيْفًا.

Allāh wills to lighten the burden from you. And man is created weak.[3]

وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّيْنِ مِنْ حَرَجٍ.

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[1] Sūrah al-Mā'idah, 5: 6.

[2] Sūrah al-Baqarah, 2: 185.

[3] Sūrah an-Nisā', 4: 28.

He has laid no hardship on you in religion.[1]

Rasūlullāh sallallāhu ʿalayhi wa sallam said:

يسروا ولا تعسروا بشروا ولا تنفروا. (رواه البخارى)

Make things easy, do not make them difficult. Give glad tidings, do not cause people to distance themselves from you.

وقال عليه الصلاة والسلام: إنما بعثتم ميسرين ولم تبعثوا معسرين. (رواه ابو داود، والترمذى، وقال: ہذا حديث حسن صحيح، وأحمد)

You have been sent to make things easy. You haven't been sent to make them difficult.

وقال رسول الله صلى الله عليه وسلم: إنما بعثت بالحنيفية السمحة السهلة. (رواه الطبرانى بسند فيه ضعف)

I have been sent with the pure, forbearing and easy religion.

The great Hadīth expert, Sufyān Thaurī rahimahullāh said:

إنما العلم عندنا الرخصة من ثقة، أما التشديد فيحسنه كل أحد. (ادب المفتى والمستفتى، ورواه ابن عبد البر فى جامع بيان العم وفضله، والمجموع شرح المهذب)

I consider true knowledge to be leniency from a reliable scholar. As for strictness, anyone and everyone can adopt it.

Abul Fadl ibn Tāhir relates from ʿUmar ibn Is-hāq, a Tābiʿī, who said:

[1] Sūrah al-Hajj, 22: 78.

كان من أدركت من أصحاب محمد صلى الله عليه وسلم أكثر من مائتين، لم أر قوماً أهون سيرة، ولا أقل تشديداً منهم- (رواه البيهقي في شعب الإيمان)

I met more than two hundred Companions of Muhammad sallallāhu ʿalayhi wa sallam. I did not come across anyone more easy-going than them, nor less stringent than them.

وهكذا كان علماء السلف: إذا شددوا فعلى أنفسهم، أما على الناس فييسرون ويخففون.

This is how the ʿulamā’ of the past were: They were strict against their own selves, but provided ease and leniency to the people.

ʿUmar ibn ʿUthmān Makkī says with reference to Imām Muzanī rahimahullāh:

كان أشد الناس تضييقاً على نفسه فى الورع، وأوسعه في ذلک على الناس. (سير اعلام النبلاء، وطبقات الشافعية الكبرى للسبكى)

He was extremely harsh on himself in abstinence, but the most lenient in that regard with people.

وكذا وصفوا محمد بن سيرين: قال تلميذه عون: كان محمد أرجى الناس لهذه الأمة، وأشدهم إزراء على نفسه. (رواه البيهقي في شعب الإيمان)

ʿAun who was a student of Muhammad ibn Sīrīn said with reference to his teacher: Muhammad gave the most hope to people, but he was the harshest to his own self.

Imām Abul Hasan Karkhī rahimahullāh says with reference to adopting a lenient attitude in dealings and transactions:

الأصل : أن أمور المسلمين محمولة على السداد والصلاح حتى يظهر غيره.

The fundamental is that matters of the Muslims should be based on appropriateness and the common good unless something else becomes apparent.

الأصل: أن المتعاقدين إذا صرحا بجهة الصحة صح العقد وإذا صرحا بجهة الفساد فسد وإذا أبهما صرف إلى الصحة.

When both parties to a contract explicitly incline towards correctness, the agreement will be valid. If both clearly incline to corruptness, it will be invalid. If both speak in vague terms, it will be considered to be valid.

الاحتياط في حقوق الله تعالىٰ، لا في حقوق العباد. (رسالة أصول الكرخي)

Preventative measures have to be given preference in the rights of Allāh taʿālā, but this does not apply in the rights of humans.

Based on the above texts, the jurists have divided the rulings of the Sharīʿah into two categories.

(1) Rulings which never change – neither because of time and place, ijtihād, nor societal norms and habits. These include obligatory duties, textual prohibitions, penal punishments stipulated by the Sharīʿah for committing certain crimes.

(2) Rulings which change due to time and place, the demands of prudence and conditions.

The first category is mostly related to acts of worship because the angle of caution is applied more to acts of worship. There is a well-known principle laid down by the jurists:

الصلاة إذا دارت بين الصحة والفساد تعاد احتياطا.

> If there is a doubt between the validity and invalidity of a salāh, it will be repeated as a precaution.

The second category is by and large related to dealings and transactions. The jurists are more embracing, lenient and easy-going in these rulings.

In his *Sharh ʿUqūd Rasm al-Muftī*, ʿAllāmah Shāmī rahimahullāh writes under the ruling of qafīz at-tahhān that specification of Sharīʿah proofs is permissible if it is because of societal norms. In other words, qiyās can be left aside. This is why the scholars permit commission agents.

Imām Abū Yūsuf rahimahullāh says that when a text is based on a societal norm, and the latter changes, the fatwā will be issued according to the [new] societal norm. For example, wheat used to be measured by volume on the basis of text, but in our times it is weighed. This is why the fatwā is issued on the latter.[1]

A sale with a precondition is impermissible, but a widely-accepted precondition is permissible. Ignorance and hazard invalidate a transaction, but a minor ignorance and a minor hazard which do not lead to a dispute are permitted according to the jurists.[2]

The purchase and sale of rights was impermissible by early jurists, but the latter day jurists permit it.[3]

According to latter day jurists, qiyās may be left out because of a general societal norm. The zāhir ar-riwāyah may also be left out because of general or specific societal norms.[4]

An expedient (*hīlah*) which gives one freedom from the unlawful is not only permissible but commendable:

كل ما يتخلص به عن الحرام ويتوسل به إلى الحلال من الحيل فهو حسن. (الفتاوى الهندية: ٣٩٣/٤)

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[1] *Radd al-Muhtār, Fath al-Qadīr, Hāshiyah Sharh al-Qawāʿid al-Fiqhīyyah* of Shaykh Mustafā Zarqā'

[2] ʿAlī Ahmad Nadwī, *Jamharah al-Qawāʿid al-Fiqhīyyah.*

[3] *Shurūh al-Majallah.*

[4] *Al-ʿUrf Wa al-ʿĀdah Fī Ra'y al-Fuqahā', Sharh ʿUqūd Rasm al-Muftī.*

Rasūlullāh sallallāhu ʿalayhi wa sallam himself opted for the easier way in transactions. This is gauged from the stratagem which he showed with regard to the sale of dates. This is known to those who teach and study Hadīth.

Imām Abū Hanīfah rahimahullāh – due to his piety and abstinence – was extremely cautious in matters related to acts of worship. But when it came to dealings and transactions, he used to be extremely lenient on the masses. This can be gauged from a study of the chapters on *buyūʿ* and *ijārāt* in the books of jurisprudence.

A few examples are presented below:

If the tenant of a house or business commits an unlawful action, the rental income is not unlawful. Where the action of a person is an obstacle, extreme caution was resorted to in labelling it unlawful.

If a person's wealth is mixed with lawful and unlawful income, and the former is more, then it is permissible to accept a wage from him, accept his gift, and also accept his invitation to a meal.

If there is anything from which lawful benefit can be derived, then its sale and purchase are not unlawful.

The same stance has been adopted by our seniors. That is, they were extremely cautious in matters related to worship, while they were embracing and lenient in matters related to transactions for the benefit of the masses. This point is well-known to those who studied the books, Hadīth commentaries and legal verdicts of our seniors.

A few examples are presented below:

An article titled *Muʿāmalāt Se Mutaʿalliq Fatwei Mei Tawassuʿ* with reference to Hadrat Thānwī rahimahullāh was published in the monthly *al-Furqān*. The following is quoted from this article:

> Hadrat Hakīmul Ummat Thānwī rahimahullāh spoke about the importance of lawful sustenance in a lecture titled *Ādāb al-Musāb*. In it, Hadrat rahimahullāh said: "In which there is certainly a lot of leniency and ease for the Muslim community." He said:
>
> In this regard, it is my opinion that if in muʿāmalāt (dealings and transactions), there is constraint in one's own madh-hab, while there is leeway in the opinions of other Imāms, then the masses should not be put into constraint. Instead, the fatwā should be issued on the opinion of the other Imāms...I have obtained an explicit support for this view from Hadrat

Maulānā Gangohī rahimahullāh. (*Ādāb al-Musāb*, from the series *at-Tablīgh*, p. 139).

Nowadays we observe preference to strictness in the temperament of many of the muftīs of our time. The teachings, guidance and Dīnī temperament of Rasūlullāh sallallāhu ʿalayhi wa sallam are undoubtedly what is gauged from the above statement of Hadrat Hakīmul Ummat rahimahullāh.[1]

Hadrat Shāh Sāhib rahimahullāh said that ignorance which does not lead to dispute could be tolerated on the basis of religious integrity. He expressed his inclination to the permissibility of hibah al-mushāʿ.

As for the types of gharar and its difference on the basis of judicial decree and religious integrity is clearly stated in *Fayd al-Bārī.*

The great Hadīth expert, Hadrat ʿAllāmah Yūsuf Bannūrī rahimahullāh stated that a sale before taking possession of an item is permissible. He based his verdict on another madh-hab. (*Bayyināt*)

Hadrat Hakīmul Ummat rahimahullāh issued a fatwā on *bayʿ as-salam* on the madh-hab of Imām Shāfiʿī rahimahullāh.[2]

While issuing a fatwā on *bayʿ as-salam* on the madh-hab of Imām Shāfiʿī rahimahullāh, the ex-grand muftī of Pakistan, Hadrat Muftī Walī Hasan Sāhib rahimahullāh writes:

In the light of current challenges, the jurists say that if in these matters, the fatwā is issued on the view of Imām Shāfiʿī rahimahullāh, then there is room for it so that the wealth of people could be saved against unlawfulness.

Note: There are two systems in this world – one is *ʿibādāt* (acts of worship) and the other is *muʿāmalāt* (dealings and transactions). Explicit texts are required for *ʿibādāt*. As for *muʿāmalāt*, every Imām can provide ease.[3]

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[1] Hadrat Maulānā Muhammad Zakarīyyā Nadwī in *al-Furqān* (Lucknow), p. 33, October 1981.

[2] *Imdād al-Fatāwā*, vol. 3, p. 21, 106.

[3] *Dars al-Hidāyah*, p. 329, *Shurūt as-Salam*, Maktabah Iqra'.

Hadrat Hakīmul Ummat rahimahullāh issued a verdict of permissibility for *shirkat al-ʿurūd* (partnership with merchandise) in line with the madh-hab of Imām Mālik rahimahullāh.[1]

In another place, Hadrat Hakīmul Ummat rahimahullāh issued a verdict which is contrary to Hanafī principles:

Answer:

كتب إلى بعض الأصحاب من فتاوى ابن تيمية كتاب الاختيارات ما نصه: ولو دفع دابته أو نخله إلى من يقوم له وله جزء من نمائه صح وهو رواية عن أحمد.

This is impermissible according to Hanafī principles, as quoted in the question from [*Fatāwā*] *ʿĀlamgīrīyyah*. However, based on the views of some Hambalī scholars, there is room for its permissibility. Abstention will be the more cautious response, but where there is severe tribulation, leeway could be given.[2]

In *ʿItr Hidāyah*, Hadrat ʿAllāmah Fath Muhammad Sāhib Lucknowī rahimahullāh issued the verdict that a rental lease of more than one hundred years will not be invalidated by the death of one of the signatories to the lease.[3]

There are thousands of rulings of our jurists and seniors where they issued verdicts on the basis of another madh-hab or against zāhir ar-riwāyah because of societal norms and habits.

Our Dār al-Iftā' belongs to the same golden chain. Our Hadrat Muftī Radā' al-Haqq Sāhib – may Allāh taʿālā protect him – is affiliated to the same seniors. He is the Shaykh al-Hadīth of this Madrasah and its Chief Muftī concurrently. He had been a muftī at Jāmiʿah al-ʿUlūm al-Islāmīyyah, Binnaurī Town (Karachi) for quite some time. He is of a balanced temperament, is fully aware of the people of his time, chooses the lenient and easy way for the general public, holds views which are most in line with Hadīth, does his best to save people from harām and to bring them close to the Sharīʿah. He does not hold on

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[1] *Imdād al-Fatāwā*, p. 495; *Imdād al-Ahkām.*

[2] *Imdād al-Fatāwā*, vol. 3, p. 343, Kitāb al-Ijārah.

[3] *Halāl Wa Harām Ke Ahkām* (known as *ʿItr Hidāyah*), p. 423; *Takmilah ʿUmdah ar-Riʿāyah Hāshiyah Sharh Wiqāyah*, vol. 3, p. 311, Bāb Faskh al-Ijārah, footnote number four.

dogmatically to books. He abstains from disregarding societal norms and common sense. The reader will clearly observe these qualities in this volume which is devoted to dealings and transactions.

In many places, we quoted the views of both sides so that the path may remain open to those who want to practise on the side of caution, and the circle of permissibility may remain wide for those who want to save themselves from harām.

At the same time, we request the scholars and elite to hold on firmly to the reins of caution and non-indulgence as far as possible. They must leave permissibility and concessions for the general public.

In short, do not misconstrue the views in this book to be contradictory. Rather, you may benefit from it by looking at the greater objective.

وكم من عائب قولا صحيحا – وآفته من الفهم السقيم.

فالمسئول من كل واحد من إخواني والأعزة البررة أن ينظروا فيه بعين الرضاء دون التعصب والمراء، وإن وجدوا فيها سقما عالجوا بالدواء كالرحماء من الأطباء، ولله در من قال:

وإن تجد عيبا تسد خللا – فجل من لا عيب فيه وعلا

إذا رأيت أثيما كن ساترا وحليما – يا من يقبح أمري لم لا تمر كريما

No matter what, man is bound to forget and no one can make claims to innocence. I therefore request the reader that when he comes across any mistakes, he must attribute them to this servant and do me the favour of informing me. I will be immensely grateful.

In addition to the paucity of my resources, I am lacking in knowledge and practice. It was because of their noble thoughts that my seniors shouldered me with this mammoth task. Whatever little was achieved was done solely through Hadrat's affection and kindness. I could never have done it on my own.

It will be highly ungrateful of me if I do not make mention of my honourable teacher, the principal of the Madrasah – Hadrat Maulānā Shabbīr Ahmad Sāhib Sālūjī – and Hāfiz Bashīr Ahmad Sāhib, the administrator of the Madrasah. Their constant affections and acts of kindness on me is like a cool breeze on a blistering day. May Allāh

taʿālā reward them with the best of rewards, and may He honour their services with acceptance. Āmīn.

May Allāh taʿālā increase the knowledge and practice of the post-graduate students who assisted me in the editing of this book. May He accept them for the service of His Dīn for a long time and in far away places. Āmīn. O Allāh! Inspire us to do what You love and what You are pleased with.

وآخر دعوانا أن الحمد لله رب العٰلمين.

وصلى الله تعالىٰ على خير خلقه محمد وآله وصحبه أجمعين.

Muhammad Ilyās ibn Afdal Shaykh
Assistant, Dār al-Iftā’, Dār al-‘Ulūm Zakarīyyā, South Africa
13 Dhū al-Hijjah 1432 A.H./9 November 2011

A BIRD'S EYE VIEW OF DĀR AL-'ULŪM ZAKARĪYYĀ

- Hadrat Shaykh al-Hadīth Maulānā Muhammad Zakarīyyā Sāhib rahimahullāh visited South Africa in 1981 and supplicated in favour of a Dār al-ʿUlūm. His supplication was accepted and the foundation was laid for Dār al-ʿUlūm Zakarīyyā which is named after him.
- The Madrasah was formally opened in December 1983 under the leadership of Hadrat Qārī ʿAbd al-Hamīd Sāhib, Maulānā Shabbīr Ahmad Sāhib and their associates. Qārī ʿAbd al-Hamīd Sāhib was the principal until 1985.
- After Qārī ʿAbd al-Hamīd Sāhib departed for India, Maulānā Shabbīr Ahmad Sālūjī Sāhib was appointed as the principal and Hāfiz Bashīr Sāhib the administrator. They are continuing with their services to this day. It is through their attention and forceful efforts that Dār al-ʿUlūm is on the path of progress. May Allāh *taʿālā* reward them with the best of rewards.

Departments at Dār al-'Ulūm Zakarīyyā

1. Tahfīz al-Qur'ān.
2. Dars Nizāmī.
3. Iftā' wa Istiftā'. It has been active since 1987 under the supervision of Hadrat Muftī Radā' al-Haqq Sāhib. In the beginning, Hadrat Muftī Sāhib used to write the fatāwā personally. A formal Dār al-Iftā' was then established in 1992.
4. Qirā'at Wa Tajwīd. This was initiated in 1988.
5. An-Nādī al-ʿArabī. The enthusiasm and eagerness of the students increased towards Arabic literature, so they began taking part in the written and spoken aspects of the language.
6. Dār al-ʿUlūm Zakarīyyā has a branch for hifz students. This was established by the administrators about ten kilometres from the Madrasah in the year 2000. It was the wish of the mother of Janāb ʿAbd ar-Rahmān Miyā Sāhib to have such a madrasah established. It houses about one hundred students, five teachers and five classrooms.

May Allāh taʿālā reward all the teachers, administrators and members of the Madrasah. May He shower this Madrasah and other academic institutions with progress, protect them against every tribulation, and shower them with His special mercy. Āmīn.

The blessed visits of seniors, imāms and other guests enabled this Madrasah to become a lush and verdant valley. Some of the guests who visited are:

Hadrat Muftī Mahmūd Hasan Gangohī, Hadrat Maulānā Qārī Siddīq Ahmad Bāndwī, Hadrat Muftī Ahmad ar-Rahmān, Hadrat Muftī Walī Hasan, Dr. ʿAbd ar-Razzāq, Hadrat Maulānā Muhammad Yūsuf Ludhyānwī, Hadrat Hājī Fārūq, Hadrat Maulānā ʿUmar Pālanpūrī, Hadrat Qādī Mujāhid al-Islām, Bhāi Pādia Sāhib, Hadrat Maulānā ʿUmarjī, Hadrat Maulānā ʿAbd al-Hafīz Makkī, Hadrat Muftī Ahmad Khānpūrī, Hadrat Maulānā Muhammad Sarfarāz Khān Safdar, Hadrat Maulānā ʿAbdullāh Kāpaudrawī, Hadrat Maulānā Idrīs Mīrathī, Shaykh ʿAbd al-Fattāh Abū Ghuddah, Shaykh ʿAbd ar-Rahmān Sudays, Shaykh Shuraym, Shaykh Sālih ibn Humayd, Shaykh ʿAbd ar-Rahmān Hudhayfī, Shaykh Subayyil, Shaykh Salāh Budayr, Shaykh Muhammad ʿAlī Sābūnī, Hadrat Muftī Taqī ʿUthmānī, Hadrat Muftī Muhammad Rafīʿ ʿUthmānī, Hadrat Muftī ʿAzīz ar-Rahmān, Hadrat Maulānā Arshad Madanī, Hadrat Maulānā Marghūb ar-Rahmān, Dr. ʿAbdullāh ʿUmar Nasīf, Hadrat Maulānā Sayyid Rābiʿ Nadwī, Hadrat Maulānā Salīmullāh Khān, Hadrat Maulānā Salmān Nadwī, Hadrat Hakīm Akhtar, Hadrat Muftī Saʿīd Ahmad Pālanpūrī, Hadrat Muftī Fārūq Mīrathī, Hadrat Maulānā Yūnus Pūnā, Hadrat Maulānā Ibrāhīm Dewlā, Shaykh al-Hadīth Maulānā Yūnus, Hadrat Maulānā Badīʿ az-Zamān, Hadrat Maulānā Sālim, Hadrat Maulānā Anzar Shāh Kashmīrī, Hadrat Bhāi Talhah ibn Hadrat Shaykh al-Hadīth, Hadrat Maulānā Rahmatullāh Kashmīrī, Hadrat Maulānā Abul Qāsim Benārasī, Shaykh Muhammad ʿAwāmah, and his son, Shaykh Dr. Muhīyy ad-Dīn. May Allāh taʿālā shower His mercy on those who passed on, and may He protect those who are still living.

Muhammad Ilyās ibn Afdal Shaykh
Assistant, Dār al-Iftā', Dār al-ʿUlūm Zakarīyyā, South Africa
16 Shaʿbān 1433 A.H./6 July 2012

TRADE AND COMMERCE

PERMISSIBLE AND IMPERMISSIBLE TRANSACTIONS

Demanding more than the agreed price

Question

A person had a telephonic discussion with regard to purchasing a vehicle. He undertook a long journey to take possession of the vehicle. When he reached, the seller asked for R10 000.00 more than the agreed price. What is the ruling? Is it permissible for the seller to do this? What is the ruling with regard to the transaction seeing that the consent of the buyer is absent?

Answer

Once the transaction was completed, the buyer became the owner of the vehicle. The seller can only collect the amount which was agreed upon. It is not permissible for him to demand more. Yes, if the buyer happily pays the extra amount, then it is fine. There has to be mutual consent from both parties.

ʿAllāmah Ibn Nujaym Misṟī raẖimahullāh (926-970 A.H.) writes:

إذا كان الإيجاب من المشتري فقبل البائع بأنقص من الثمن أو كان من البائع فقبل المشتري بأزيد انعقد، فإن قبل البائع الزيادة فى المجلس جازت كما فى التاتارخانية. وأما شرائط اللزوم بعد الانعقاد والنفاذ فخلوه من الخيارات الأربعة المشهورة ويزاد خيار الكمية وخيار الغبن إذا كان فيه غرور. (البحر الرائق: ٥/٢٥٨، ٢٦١، كتاب البيوع، كوئته)

الهداية:

وإذا حصل الإيجاب والقبول لزم البيع ولا خيار لواحد منهما إلا من عيب أو عدم رؤية. (الهداية:٣/٢٠)

If the transaction was not completed and both parties were still deciding, and then the seller asks for a higher price, the buyer has the choice to either purchase the item or not purchase it. This is because there has to be consent, and here the buyer is not in agreement.

Allāh taʿālā says:

يٰأَيُّهَا الَّذِيْنَ اٰمَنُوْا لَا تَأْكُلُوْآ أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلاَّ أَنْ تَكُوْنَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ.

O believers! Do not devour the wealth of each other among yourselves wrongfully unless it be a transaction by mutual consent.[1]

(البيع) هو مبادلة المال بالمال بالتراضي ويلزم بإيجاب وقبول. (كنز الدقائق: ٢٢٧، امداديه)

It is against the teachings of Rasūlullāh sallallāhu ʿalayhi wa sallam to deceive someone. It is necessary to abstain from deception. Rasūlullāh sallallāhu ʿalayhi wa sallam said: "The one who deceives is not of us."

عن أبي هريرة رضي الله عنه أن رسول الله صلى الله عليه وسلم مر على صبرة من طعام فأدخل يده فيها، فنالت أصابعه بللاً، فقال: يا صاحب الطعام ماهذا؟ قال: أصابته السماء يا رسول الله. قال: أفلا جعلته فوق الطعام حتى يراه الناس، ثم قال: "من غش فليس منا." قال المحشي: أى ليس من أخلاقنا ولا على سنتنا، قال أبو عيسىٰ: والعمل على هذا عند أهل العلم وقالوا: الغش حرام. (ترمذى شريف مع الحاشية: ٢٤٥/١، باب ما جاء فى كراهية الغش فى البيوع)

Allāh taʿālā knows best.

When a seller attaches conditions to a transaction

Question

Is it permissible for a seller to attach the following conditions:

1. No claims will be accepted once the fabric is cut.
2. Returns will only be accommodated when an invoice number is provided.

[1] Sūrah an-Nisā', 4: 29.

3. The right to return a fabric will be valid for up to seven days.
4. The goods belong to the seller until they are paid for in full.

Answer

1. The first condition is valid. It means that once the fabric is cut, the seller is not accountable for any defects. It is correct and permissible to lay down the condition of freedom from defects.

الهداية:

ومن باع عبداً وشرط البراءة من كل عيب فليس له أن يرده بعيب وإن لم يسم العيوب بعددها. (الهداية، كتاب البيوع، باب خيار العيب، ٤٨/٣، وكذا فى المبسوط للامام السرخسى: ٩١/١٢)

شرح المجلة:

إذا باع ماله بشرط براءة ذمته من دعوى كل عيب فلا يكون للمشتري خيار عيب. (شرح المجلة لمحمد خالد الاتاسى، البيوع، الفصل السادس فى خيار العيب، ٣٠٥/٢، رشيدية)

2. Nowadays, every item can be allocated a number and saved on a computer. This is known as a barcode. When a person buys an item, he is given a bill or invoice with the barcode number of the item. It is necessary for him to keep it safely because it is required when returning the item. This system is common in society and is done for the sake of ease. It is correct and permissible to do this. There is no reason for it to be impermissible.

العادة المطردة هل تنزل منزلة الشرط قال في إجارة الظهيرية: والمعروف عرفاً كالمشروط شرطاً. انتهى. (الاشباه والنظائر: القاعدة السادسة، العادة محكمة، ٢٧٨/١)

3. The third condition is exactly like the first. The seller will absolve himself from every type of defect after seven days. This is correct and permissible.

4. Once the transaction is complete, the buyer becomes the owner of the item. The seller's condition of ownership is not correct with

respect to a sale which is to be paid in instalments. It can be applied to an immediate transaction. That is, as long as the buyer does not pay the full amount, the item will remain in the possession of the seller.

لو باع بشرط أن يحبس المبيع إلى أن يقبض الثمن فهذا الشرط لا يضر بالبيع بل ہو بيان لمقتضى البيع، فإن للبائع حبس المبيع إلى أن يقبض الثمن ولو لم يشترط ذلک فی العقد. (شرح المجلة للأتاسی، البيوع، الباب الاول فی بيان المسائل المتعلقة بعقد البيع، الفصل الرابع فی حق البيع بشرط: ٦١/٢، رشيدية)

Allāh ta'ālā knows best.

When a condition of "free-service" is attached to a transaction

Question

Many companies claim to provide a free-service. However, when there is a need for a service, they charge a full fee for it. What is the ruling? Is it permissible to attach a condition of free-service?

Answer

We gauge from the texts of our seniors that laying down a condition of free-service is similar to a person buying leather from a shopkeeper on the condition that the seller will make a pair of shoes out of it. The jurists concur that such a condition is permissible. Therefore, we ought to apply this rule. Yes, if the buyer breaks a part of the machine, the seller or company cannot be held responsible.

وحاصل ما ذكره الفقهاء فی البيع مع الشرط أن الشرط الذي يقترن بہ البيع إما أن يقتضيہ العقد، وإما أن لا يقتضيہ العقد لکن يلايمہ، وإما أن لا يقتضيہ العقد ولا يلايمہ لکن قد جرى العرف باشتراطہ، وإما أن لا يقتضيہ العقد ولا يلايمہ ولا جرى العرف باشتراطہ، لکن لا منفعة فيہ لأحد، فالبيع في ہذہ الوجوہ الأربعة صحيح والشرط معتبر فی الوجوہ الثلاثة الأولى منها، ويلغو فی الوجہ الرابع. (شرح المجلة لمحمد خالد الاتاسی، ٥٩/٢، الفصل الرابع فی حق البيع بشرط)

Muftī Taqī 'Uthmānī Sāhib writes:

وخلاصة مذهب الحنفية في ذلک أنہ إن کان شرطاً يقتضيہ العقد، أو يلائم العقد أو شرطاً جرى بہ التعامل بين الناس، فهو جائز ولا يفسد بہ البيع... ومثال الشرط الذي جرى بہ التعامل ما إذا اشترى نعلاً على أن يحذوه البائع أو جراباً على أن يخرزه لہ خفاً، قال السرخسي في المبسوط: وإن کان شرطاً لا يقتضيہ العقد، وفيہ عرف ظاہر فذلک جائز أيضاً، کما لو اشترى نعلاً وشراکاً بشرط أن يحذوه البائع، لأن الثابت بالعرف ثابت بدليل شرعي، ولأن فى النزع عن العادة الظاہرة حرجاً بيناً، وقال الکاساني: فى البدائع: ١٧٢/٥. والقياس أن لا يجوز وہو قول زفر، وجہ القياس أن ہذا شرط لا يقتضيہ العقد وفيہ منفعة لأحد العاقدين، وإنہ مفسد... ولنا أن الناس تعاملوا ہذا الشرط فى البيع،کما تعاملوا الاستصناع فسقط القياس بتعامل الناس، کما سقط فى الاستصناع. (تکملة فتح الملهم: ٦٢٩/١، مسئلة الشرط فى البيع)

الهداية:

ومن اشترى نعلاً على أن يحذوه البائع أو يشرکہ فالبيع فاسد. وفى الاستحسان يجوز للتعامل فيہ. (الهداية: ٦١/٣)

Jadīd Fiqhī Masā'il:

To increase sales and to encourage customers to buy, businesses give warranties and guarantees up to a certain period for their products. This is an important issue because the Sharīʿah does not permit any additional conditions to a transaction. This is why the jurists consider transactions of this nature to be invalid. This would mean that guarantees of this nature will render the transaction impermissible. However, the jurists are of the view that the objective behind the Sharīʿah's prohibition is to close the door to disputes. As for conditions which become common and in vogue, they do not cause disputes. Therefore, conditions of this nature have been permitted and made worthy of consideration.

The author of *al-Hidāyah* makes an exclusion to conditions of this nature:

إلا أن يكون متعارفاً. (الهداية: ٥٩/٣، باب البيع الفاسد)[1]

To sum up, a precondition is not an invalidator of a transaction. Rather, the one which could lead to disputes is an invalidator. As for a condition which is in line with the requirements of the transaction and is a suitable condition, there is leeway for it. Nowadays, most conditions have become common in society and also in line with the transaction. Therefore, we will not say that they invalidate a transaction.

الهداية:

ثم جملة المذهب فيه أن يقال كل شرط يقتضيه العقد كشرط الملك للمشتري لا يفسد العقد لثبوته بدون الشرط، وكل شرط لا يقتضيه العقد وفيه منفعة لأحد المتعاقدين أو للمعقود عليه وهو من أهل الاستحقاق يفسده كشرط أن لا يبيع المشترى العبد المبيع لأن فيه زيادة عارية عن العوض فيؤدى إلى الربا أو لأنه يقع بسببه المنازعة فيعرى العقد عن مقصوده إلا أن يكون متعارفاً لأن العرف قاضٍ على القياس. (الهداية: ٥٩/٣، باب البيع الفاسد)

الكفاية:

وكذا كل شرط لا يقتضيه العقد إلا أنه يلائم البيع أى يؤكد موجبه كالبيع بشرط أن يعطى المشترى بالثمن رهناً أو كفيلاً وهو معلوم بالإشارة أو التسمية لا يفسد العقد أيضاً. (الكفاية على هامش فتح القدير: ٧٧/٦، كتاب البيوع، مكتبه رشيديه)

[1] *Jadīd Fiqhī Masā'il*, vol. 1, p. 387; *Taqrīr at-Tirmidhī*, vol. 1, p. 109.

المبسوط:

وإن كان شرطاً لا يقتضيه العقد، وفيه عرف ظاهر، فذلك جائز أيضاً، لأن الثابت بالعرف ثابت بدليل شرعي، ولأن فى النزع عن العادة الظاهرة حرجاً بيناً. (المبسوط للامام السرخسى: ٤١/١٣)

وللاستزادة انظر: (الدر المختار مع رد المحتار: ٨٧/٥، ٨٨، مطلب فى البيع بشرط فاسد، سعيد، وبدائع الصنائع فى ترتيب الشرائع: ١٧٢/٥، كتاب البيوع، سعيد، والفتاوى الهندية: ١٣٣/٣، كتاب البيوع، وحاشية الطحطاوى على الدر المختار: ٧٧/٣، كتاب البيوع، كوئته)

Allāh ta'ālā knows best.

An objection to a conditional transaction

Question

An objection is made to the permissibility of a conditional transaction. Rasūlullāh sallallāhu 'alayhi wa sallam prohibited a conditional transaction, how can you then say it is permissible? A Hadīth states:

نهى رسول الله صلى الله عليه وسلم عن بيع وشرط.

> Rasūlullāh sallallāhu 'alayhi wa sallam prohibited a transaction with an attached condition.

This Hadīth demands that such a transaction be impermissible.

Answer

The answer to this is that this Hadīth is an *'illah bi ma'lūl* (a cause for the sake of diverting from a want). This means that where there is the possibility of dispute, the transaction will be invalid. If there is no possibility of a dispute, the transaction will not be invalid. We could say that the above Hadīth means:

نهى عن بيع وشرط إذا أدى إلى النزاع.

> He prohibited a transaction with an attached condition if it will cause a dispute.

الدر المختار:

فإن قلت: نہی صلی اللہ علیہ وسلم عن بیع وشرط، فیلزم أن یکون العرف قاضیاً علی الحدیث، قلت: لیس بقاضٍ علیہ، بل علی القیاس، لأن الحدیث معلول بوقوع النزاع المخرج للعقد عن المقصود بہ، وہو قطع المنازعة، والعرف ینفی النزاع فکان موافقاً لمعنی الحدیث، فلم یبق من الموانع إلا القیاس والعرف قاضٍ علیہ. قلت: وتدل عبارة البزازیة والخانیة، وکذا مسألة القبقاب علی اعتبار العرف الحادث، ومقتضی ہذا أنہ لو حدث عرف في شرط غیر الشرط فی النعل والثوب والقبقاب أن یکون معتبراً إذا لم یؤد إلی المنازعة. (الدر المختار مع رد المحتار: ٨٨/٥، کتاب البیوع، سعید)

(وکذا فی العنایة علی الهدایة علی ہامش فتح القدیر: ٤٤٢/٦، دار الفکر. والفقہ الحنفی فی ثوبہ الجدید: ٦٤/٤، الاصل الجامع فی بیان الشرط الفاسد)

وللمزید أنظر: (نشرالعرف فی بناء بعض الاحکام علی العرف، وعمدة القاری: ٥٠٠/٣، باب ذکر البیع والشراء علی المنبر فی المسجد، ط: ملتان)

تکملة فتح الملہم:

وقد کثرت في عہدنا أنواع الشروط فی البیوع والإجارات وغیرہا فکل ما جری بہ التعامل العام کان جائزاً، مثل ما تعورف فی العالم کلہ أن مشتری الثلاجات، والدافئات، والماکینات الأخری یشترط علی البائع القیام بتصلیحہا کلما عرضہا فساد في حدود مدة معلومة،کالسنة أو السنتین مثلاً، فإن ہذا الشرط جائز لشیوع التعامل بہا. (تکملة فتح الملہم: ٦٣٥/١، مسئلة الشرط فی البیع)

Allāh taʿālā knows best.

Trading in worms and reptiles

Question

Is it permissible to trade in worms, snakes, etc.?

Answer

A principle of the Sharīʿah is that it is permissible to trade in an item from which benefit can be derived. Since benefit can be derived from the skins of snakes or other body parts of worms, reptiles, etc., it will be permissible to trade in them.

الدر المختار:

ويباع دود القز وبيضه والنحل المحرز وهو دود العسل... بخلاف غيرهما من الهوام إلا السمك وما جاز الانتفاع بجلده أو عظمه... والحاصل أن جواز البيع يدور مع حل الانتفاع. وفى الشامية: فى الحاوى الزاهدي: يجوز بيع الحيات إذا كان ينتفع بها للأدوية وما جاز الانتفاع بجلده أو عظمه أى من حيوانات البحر أو غيرها. (الدر المختار مع فتاوى الشامى: ٦٨/٥، مطلب فى بيع دودة القرمز)

شرح العناية:

قوله ولا يجوز بيع دود القز وبيضه... وجاز عند محمد لكونه منتفعاً به لمكان الضرورة في بيعه قيل: وعليه الفتوىٰ (شرح العناية: ٦/ ٤٢٠. وكذا فى البحر الرائق: ٦/٧٨، باب البيع الفاسد)

الفتاوى الهندية:

وفى النوازل ويجوز بيع الحيات إذا كان ينتفع بها فى الأدوية وإن كان لا ينتفع بها لا يجوز والصحيح أنه يجوز بيع كل شيء ينتفع به كذا فى التتارخانية. (الفتاوى الهندية: ١١٤/٣، فصل فى بيع الحيوانات)

Allāh taʿālā knows best.

Trading in lion excreta

Question

In some countries, people place the excreta of lions in front of their houses to drive away cats. They have to buy this excreta from businesses. Is it permissible to trade in it?

Answer

If the lion's excreta is mixed with soil, medicine, or some other ingredient; it will be permissible to trade in it. According to another view, it can be traded even if it is not mixed with another ingredient.

لایکره بل یصح بیع السرقین أی الزبل وصح بیعها مخلوطة بتراب أو رماد غلب علیها فی الصحیح کما صح الانتفاع بمخلوطها---وفی الشامیۃ : قولہ الزبل وفی الشرنبلالیۃ ہو رجیع ماسوی الإنسان، قولہ غلب علیهاکذا قیده في موضع من المحیط والکافي والظهیریۃ ، وأطلقہ فی الهدایۃ والاختیار والمحیط فإما أن یحمل المطلق علی المقید أو یحمل علی الروایتین ، أوعلی الرخصۃ والاستحسان -(الدرالمختارمع فتاوی الشامی: ٦/ ٣٨٥، فصل فی البیع)-

وفي تقریرات الرافعي : قولہ أوعلی الرخصۃ والاستحسان أی المطلق علی الرخصۃ والمقید علی الاستحسان -(تقریرات الرافعی :٦/٣٠٨)-

وفی البحرالرائق:کره بیع العذرة لا السرقین لأن المسلمین یتمولون السرقین وانتفعوا بہ في سائرالبلاد والأمصار من غیر نکیر-(البحرالرائق:٨/١٩٩،کوئٹہ)-

Further reading: *Ahsan al-Fatāwā*, vol. 6, p. 521.

Kitāb al-Fatāwā:

It is permissible to trade in items which are impure but from which benefit can be derived. The jurists say that it is permissible to trade in

impure dung and animal droppings because even if animal droppings have not been mixed with any substance, benefit can be derived from them.[1]

Allāh taʿālā knows best.

Selling animals by weight

Question

Is it permissible to sell animals by weighing them first? I am asking this question because they are able to make themselves heavy and sometimes light. This makes it difficult to know their exact weight. However, it is common practice to trade in animals in this way. This is why I want to know the ruling of the Sharīʿah.

Answer

We learn from a text of *al-Hidāyah* that it is not permissible to sell animals by weighing them.

قال فى الهدایة: لأن الحيوان لايوزن عادة ولايمكن معرفة ثقله بالوزن لأنه يخفف نفسه مرة ويثقل أخرى - (الهداية: ٣/٨٣،باب الربوا)-

Animals are not normally sold by weight. Furthermore, their size cannot be ascertained correctly by weighing them. This is because the animal makes itself heavy at times, and light at other times.

However, nowadays, it is a general practice to trade in animals by weighing them. The inability to ascertain their correct size is classified as a "minor ignorance", and in trade, if a minor ignorance is not considered to be a cause of dispute, it is tolerated. It is not an invalidator of a transaction. We conclude from the following text of Hadrat Anwar Shāh Kashmīrī rahimahullāh (1352 A.H.) that ignorance which does not cause a dispute is not an invalidator of a transaction.

قلت: إن الناس يعاملون في أشياء تكون جائزة فيما بينهم على طريق المروءة والإغماض، فإذا رفعت إلى القضاء يحكم عليها بعدم الجواز وذلك لأن العقود على نوعين: نحو: يكون معصية في نفسه، وذا لا يجوز مطلقاً، ونحو

[1] *Kitāb al-Fatāwā*, vol. 5, p. 272.

آخر: لا يكون معصية وإنما يحكم عليه بعدم الجواز لافضاءه إلى المنازعة فإذا لم تقع فيه منازعة جاز. (فيض البارى: ٢٨٩/٣، كتاب الوكالة)

ʿAllāmah Akmal ad-Dīn Bābartī ra<u>h</u>imahullāh (786 A.H.) says that ignorance of the amount in usurious items is an invalidator of a transaction. This is due to the possibility of usury. It is not an invalidator in non-usurious items.

قال فى العناية: وبهذا إنما يستقيم إذا لم تكن الأعراض ربوية، أما إذا كانت ربوية فجهالة المقدار تمنع الصحة لاحتمال الربا. (شرح العناية على هامش فتح القدير: ٢٦٠/٦، دار الفكر)

Jadīd Muʿāmalāt Ke Sharʿī A<u>h</u>kām:

If the buyer and seller agree to a transaction where the animal is weighed, then once it is weighed, it must be paid for in cash or paid with some other form of payment [provided it is not the same species of animal]. Both ways of payment are permissible. This is on the condition that they agreed before hand on what the per-kilo-price will be. Furthermore, after the animal was weighed, its value was also specified. Take the following scenario as an example:

The buyer needs one goat. He goes to the seller and selects one. The seller tells him that this particular goat will cost fifty rupees per kilo. The seller then weighs it in the presence of the buyer, and says [for example] that it weighs twenty kilos. If the seller accepts, the transaction will be complete. A transaction of this nature is permissible according to the Sharīʿah.[1]

The former grand muftī of Pakistan, <u>H</u>a<u>d</u>rat Muftī Walī <u>H</u>asan <u>S</u>ā<u>h</u>ib Taunkī ra<u>h</u>imahullāh (1415 A.H.) writes:

In the present times, the opinion of Imām Mu<u>h</u>ammad ra<u>h</u>imahullāh is better because animals are also weighed nowadays. Fowls are sold by weight. The actual purpose of weighing is that there should be no trading of an unknown item, and that the weight should be known at the time of the sale.[2]

Muftī Ni<u>z</u>ām ad-Dīn <u>S</u>ā<u>h</u>ib writes:

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[1] Muftī I<u>h</u>sānullāh: *Jadīd Muʿāmalāt Ke Sharʿī A<u>h</u>kām*, vol. 1, p. 118.

[2] *Dars al-Hidāyah*, p. 283.

If the purpose of selling a fowl by weight is so that the item [fowl] is made the objective and not only its meat, then because the actual item [fowl] is known, specified and seen before one's eyes, such a transaction will be permissible.[1]

Muftī Rashīd Ludhyānwī ra<u>h</u>imahullāh (1421 A.H.) writes:

The breathing of the fowl does not cause any drastic change in its weight. It is therefore a minor ignorance which does not lead to a dispute. Furthermore, since it has become common practice to trade in fowls in this way, there is no possibility of disputes. This transaction is therefore permissible.[2]

Īdā<u>h</u> al-Masā'il:

It is permissible to trade in fish, fowls, goats, buffalos, etc. by weighing them alive, and exchanging them for money. This is gauged from *Aujaz al-Masālik*, vol. 5, p. 105.[3]

To sum up, there could be three objections to selling animals by weight:

1. Objection: Animals are not weighed; they are counted.

Answer: They were not weighed in the past, they are commonly weighed in our times. This was made clear from the above-quoted fatāwā.

2. Objection: Animals make themselves heavy at times, and light at other times.

Answer: This is a minor ignorance which does not lead to dispute. Yes, ignorance of this nature in usurious items is harmful. Furthermore, here one species is not in exchange for the same species.

3. Objection: The weight is unknown.

Answer: This unknown fact becomes known once the animal is weighed in the presence of both parties. The possibility of dispute is removed.

Further reading: *Fatāwā 'Uthmānī*, vol. 3, pp. 98-101.

Allāh ta'ālā knows best.

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[1] *Muntakhab Nizām al-Fatāwā*, vol. 1, p. 245.

[2] *A<u>h</u>san al-Fatāwā*, vol. 6, p. 497.

[3] *Īdā<u>h</u> al-Masā'il*, p. 158.

The difference between *gharar* and ignorance of the sale item

Question

The jurists classify certain transactions impermissible because of *gharar*. What is the difference between *gharar* and ignorance of the sale item?

Answer

It seems that when we refer to it as *gharar*, the very existence of the sale item is doubtful. In other words, is the item present or not? Will it come to me or not? As for ignorance of the item, it means that the item is present but there is ignorance with regard to a quality in it, or in identifying it. For example, selling a fish which is still in the water is *gharar* because it is not known whether the seller will be able to catch it or not. A transaction involving the sale of "one of two slaves" will be classified as ignorance of the sale item [because you do not know which of the two].

الدر المختار:

وبيع الحمل أى الجنين - لنهيه صلى الله عليه وسلم عن المضامين والملاقيح وحبل الحبلة ولما فيه من الغرر –وهو الشک في وجوده. ولؤلؤ في صدف للغرر لأنه لا يعلم وجوده. (الدر المختار مع فتاوى الشامى: ٦٢/٥، باب البيع الفاسد، سعيد)

وفى الدر المختار: وبيع ثوب من ثوبين أو عبد من عبدين لجهالة المبيع. (الدر المختار: ٦٦/٥، سعيد)

شرح العناية:

ولا يجوز بيع الحبل لأن فيه غرراً وهو ما طوى عنک علمه، قال المغرب: فى الحديث: نهى النبي صلى الله عليه وسلم عن بيع الغرر. وهو الخطر الذي لا يدرى أيكون أم لا كبيع السمک فى الماء والطير فى الهواء. (شرح العناية: ٤١١/٦، دار الفكر)

بدائع الصنائع:

الغرر هو الخطر الذي استوى فيه طرف الوجود والعدم بمنزلة الشك. (بدائع الصنائع: ١٦٣/٥، سعيد)

جمهرة القواعد الفقهية:

كل بيع كان المقصود منه مجهولاً غير معلوم، ومعجوزاً عنه غير مقدور عليه فهو غرر، وذلك مثل أن يبيعه سمكاً فى الماء، أو طيراً فى الهواء، أو لؤلؤاً فى البحر، أو عبداً آبقاً، أو جملاً شارداً، أو ثوباً في جراب لم يره ولم ينشره، أو طعاماً في بيت لم يفتحه، أو ولد بهيمة لم يولد، أو ثمر شجرة لم تثمر في نحوها من الأمور التي لا تعلم، ولا يدري هل تكون أم لا، فإن البيع مفسوخ فيها. (جمهرة القواعد الفقهية: ٣٠٩/١)

Muftī Walī Hasan Sāhib rahimahullāh writes:

It is not permissible to sell milk which is in the udders of an animal before it is milked. There is *gharar* in it because sometimes the udders are filled with air. A dispute could arise between the buyer and seller on the milk which comes out. This is also the reason for the prohibition of gambling – there is *gharar* in it. *Gharar* is a hazard or a danger – its existence or absence cannot be specified.[1]

Allāh taʿālā knows best.

A minor ignorance

Question

Will a transaction be permissible if the item or the work [to be done] is unknown, but ignorance of it will not lead to dispute?

Answer

In trade, only that ignorance invalidates a transaction which leads to dispute. If it does not lead to dispute and it is commonly practised, it will be tolerated and will not invalidate the transaction.

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[1] *Dars al-Hidāyah*, p. 169.

والأثمان المطلقة لا تصح إلا أن تكون معروفة القدر والصفة لأن التسليم والتسلم واجب بالعقد وہذه الجہالة مفضية إلى المنازعة فيمنع التسليم والتسلم، وكل جہالة ہذه صفتہا تمنع الجواز ہذا ہو الأصل. (الہداية: ٢٠/٣)

It becomes clear from the above text of *al-Hidāyah* that every ignorance is not an invalidator of a transaction. Only the one which leads to a dispute is an invalidator.

شرح المجلة:

وفی الہندية (١٢٢/٣): جہالة المبيع أو الثمن مانعة لجواز البيع إذا كان يتعذر معہا التسليم وإن كان لا يتعذر لا يفسد العقد كما لو باع صبرة معينة ولم يعرف قدر كيلہا أو باع أثواباً معينة ولم يعرف عددہا، وإنما يفسد البيع بالجہالة الفاحشة إذا كان محتاجاً إلى تسليم المبيع وإلا فلا يفسد. (شرح المجلة، لسليم رستم باز، ١٠٢/١، دار الكتب العلمية)

حاشية الطحطاوی:

قولہ معرفة قدر ہو فی المصنف منون يشمل قدر المبيع والثمن قال فی البحر: وأشار بالمعرفة إلى أن الشرط العلم بہما دون ذكرہما كما فی الإيضاح فلو كان المبيع مجہولاً جہالة فاحشة ولم يجربہا العرف لا يصح البيع. (حاشية الطحطاوی على الدر المختار: ١٢/٣، كوئٹہ)

الفتاوی الہندية:

فإن كان مجہولاً جہالة مفضية إلى المنازعة يمنع صحة العقد، وإلا، فلا. (الفتاوی الہندية: ٤١١/٤، كتاب الاجارة)

فتاوى الشامى:

قوله وشرط صحته معرفة قدر مبيع وثمن ككر حنطة وخمسة دراہم أو أكرار حنطة فخرج ما لو كان قدر المبيع مجهولاً أى جهالة فاحشة، فإنه لا يصح وقيدنا بالفاحشة لما قالوه لو باعه جميع ما في ہذه القرية أو ہذه الدار والمشتري لا يعلم ما فيها لا يصح لفحش الجهالة، أما لو باعه جميع ما في ہذا البيت أو الصندوق أو الجوالق فإنه يصح لأن الجهالة يسيرة (فتاوى الشامى: ٥٢٩/٤، كتاب البيوع، سعيد)

ʿAllāmah ʿAynī (762-855 A.H.) writes:

وكل جهالة ہذه صفتها تمنع الجواز أى جواز العقد ہذا أى كون الجهالة المفضية إلى المنازعة مانعة ہو الأصل أى في كتاب البيوع بالإجماع لأن شرعية المعاملات لقطع المنازعات المفضية إلى الفساد. (البناية فى شرح الهداية: ١٥/٣)

ʿAllāmah Kashmīrī (1352 A.H.) writes:

قلت: إن الناس يعاملون في أشياء تكون جائزة فيما بينهم على طريق المروءة والإغماض، فإذا رفعت إلى القضاء يحكم عليها بعدم الجواز وذلك لأن العقود على نحوين: نحو: يكون معصية في نفسه، وذا لا يجوز مطلقاً، ونحو آخر: لا يكون معصية وإنما يحكم عليه بعدم الجواز لافضائه إلى المنازعة فإذا لم تقع فيه منازعة جاز. (فيض البارى: ٢٨٩/٣، كتاب الوكالة)

ʿAlī Aḥmad an-Nadwī writes:

الجهالة ليست بمانعة لذاتها، بل لكونها مفضية إلى النزاع، وہذا أصل مهم ينبغى التعويل عليه فى الأحكام، فإن به حل كثير من المشكلات، وليعلم أن أحكام المعاملات الشرعية مبنية على أصلين عادلين:

الأول: منع كل ما فيه ظلم وأكل لأموال الناس بالباطل.

الثاني: منع ما يؤدي إلى الاختلاف والنزاع بسبب الجهالة، فإذا انتفى ما يؤدي إلى الظلم والنزاع بسبب الجهالة، صح التعامل، والعرف أصل عظيم يرجع إليه في ذلك بعد الشرع. (جمهرة القواعد الفقهية فى المعاملات المالية: ٣١٩/١، تحت القاعدة: الجهالة انما توجب الفساد اذا كانت مفضية الى النزاع المشكل)

Hadrat Muftī Walī Hasan Sāhib rahimahullāh writes:

A general principle is that an ignorance which is a cause of dispute is prohibited, while the one which does not cause a dispute is not prohibited.[1]

Allāh ta'ālā knows best.

The right to cancel for more than three days

Question

A seller sent an offer by fax and stated therein that he will have the right to cancel the transaction for five days from the time of sending the fax. Once the buyer reads the fax, will the right remain for five days or will it be confined to the time when it reached the buyer?

Answer

In this case, the seller sent a fax to the buyer and reserved the right for himself. Once he receives the fax and the buyer accepts it, the seller – based on his right – will have the right to cancel the transaction for up to three days. Yes, if he reserves it for five days due to some need, then the juridical books in general say that a precondition of more than three days is invalid. However, in *Sharh an-Niqāyah*, Mullā 'Alī Qārī (930-1014 A.H.) states that a precondition of more than three days is valid with respect to items whose qualities and attributes cannot be ascertained within three days.

وإن كان فيه صفة لا يمكن الوقوف عليها في ثلاثة أيام يجوز أن يشترط فيه أكثر من ثلاثة أيام لأنه شرع للحاجة إلى التأمل وهي تندفع بذلك. (شرح النقاية: ١٢/٢، كتاب البيوع)

[1] *Dars al-Hidāyah*, part three, p. 29.

شرح المجلة:

المادة: ٣٠٠: يجوز أن يشترط الخيار بفسخ البيع أو إجازته مدة معلومة لكل من البائع والمشتري... قوله مدة معلومة أعم من أن تكون مدة الخيار ثلاثة أيام أو أكثر وهذا اختيار من المجلة لقول الإمامين، وبه قال أحمد، لأنه شرع نظراً للمتعاقدين للاحتراز عن الغبن وقد لا يحصل ذلك فى الثلاث فيكون مفوضاً إليهما. (عينى على الكنز: ١١/٢) (شرح المجلة لمحمد خالد الاتاسى، ٢٣٤/٢)

Allāh ta'ālā knows best.

Showing an item to one buyer but selling it to someone else

Question

A trader sold a freezer which was on display to a certain buyer. The buyer did not take it because he did not pay for it as yet. The trader then sold that freezer to someone else, thinking to himself that when the buyer comes, he will give him another freezer from the warehouse. Is it permissible to do this?

Answer

If the buyer said: "I like this particular freezer and I will not take any other one," the trader cannot sell it. But if he gives up hope in the buyer returning, he may do a one-sided cancellation and sell it to recover his money. If the trader merely showed him a sample, and not the actual item, then this transaction is classified as a "promised transaction". But if they completed the transaction, and the buyer comes later on to pick it up, the trader can give him another freezer [which was not on display]. Yes, because the item was not seen by the buyer, he will enjoy the "right of seeing", and the transaction will not be complete with respect to the freezer which was shown as a sample.

قال ومن اشترى عبداً فغاب والعبد في يد البائع وأقام البائع البينة أنه باعه إياه فإن كانت غيبته معروفة لم يبع في دين البائع لأنه يمكن إيصال البائع إلى حقه بدون البيع وفيه إبطال حق المشتري وإن لم يدر أين هو بيع العبد وأوفى الثمن لأن ملك المشتري ظهر بإقراره فيظهر على الوجه الذي أقر به

مشغولاً بحقه وإذا تعذر استيفاؤه من المشتري يبيعه القاضي فيه كالراهن إذا مات والمشتري إذا مات مفلساً والمبيع لم يقبض. (الهداية: ٣/١٠٣)

وفى الهندية: من اشترى شيئاً لم يره فله الخيار إذا رآه إن شاء أخذه بجميع ثمنه وإن شاء رده سواء رآه على الصفة التي وصفت له أو على خلافها كذا في فتح القدير وهو خيار يثبت حكماً لا بالشرط كذا فى الجوهرة النيرة. (الفتاوى الهندية: ٣/٥٧، ٥٨)

Note: Details with regard to a one-sided cancellation are provided further on.

Allāh ta'ālā knows best.

Selling a counterfeit item while claiming that it is the original

Question

A woman bought a cell-phone battery. She told the seller that she wants an original battery. The seller gave her a counterfeit battery but charged her the price of an original one. Six months later, she was informed by another trader that her battery is not a genuine one, but a fake. Does this woman have any claim against the first seller?

Answer

The seller collected the price of an original battery and gave her a fake battery. The woman therefore has a claim over a genuine battery. She must return the fake and obtain a genuine one from him. However, if the fake battery is almost dead, or has been used a lot; then the woman may collect the price difference between the original and the fake.

الهداية:

ومن له على آخر عشرة دراهم جياد فقضاه زيوفاً وهو لا يعلم فأنفقها أو هلكت فهو قضاء عند أبي حنيفة ومحمد وقال أبو يوسف يرد مثل زيوفه ويرجع بدراهمه. (الهداية: ٣/١٠٣)

وفي فتح القدير: وذكر فخر الإسلام وغيره أن قولهما قياس وقول أبي يوسف هو الاستحسان. (فتح القدير: ١٣٠/٧)

الدر المختار:

ولو قبض زيفاً بدل جيد كان له على آخر جاهلاً به... فلو قائماً رده اتفاقاً. (الدر المختار: ٢٣٣/٥، سعيد)

الهداية:

وفى الهداية: وإذا حدث عند المشتري عيب واطلع على عيب كان عند البائع فله أن يرجع بالنقصان ولا يرد المبيع لأن فى الرد إضراراً بالبائع لأنه خرج عن ملكه سالماً ويعود معيباً فامتنع ولا بد من دفع الضرر عنه فتعين الرجوع بالنقصان. (الهداية: ٤١/٣، باب خيار العيب)

Allāh ta'ālā knows best.

Selling an item by concealing its defect

Question

Sa'īd wants to buy a motorcycle which Ahmad is selling at a very low price. Sa'īd asked him: "Is there anything wrong with it?" Ahmad replied that there is nothing wrong with it, and began speaking highly of it. Sa'īd trusted Ahmad and bought the motorcycle at the low price. Subsequently, he found defects in the motorcycle. When Sa'īd asked a mechanic about it, he said that Ahmad was aware of its defects because he had tried to get it repaired but could not. My question is, is it permissible to conceal an item's defects even after the buyer asked about it? What did Rasūlullāh sallallāhu 'alayhi wa sallam say in this regard?

Answer

It is not permissible to conceal the defect/s in an item. Rasūlullāh sallallāhu 'alayhi wa sallam said that the one who deceives us is not of us. It is therefore impermissible for Ahmad to do this. If Sa'īd is not happy with the product, he has the right to return it. Yes, if Sa'īd had agreed to buy it after accepting the defects which it had, he cannot return it.

عن أبي ہريرة رضي اللہ عنہ أن رسول اللہ صلی اللہ عليہ وسلم مر علی صبرة من طعام فأدخل يده فيہا، فنالت أصابعہ بللاً، فقال: يا صاحب الطعام ماہذا؟ قال: أصابتہ السماء يا رسول اللہ! قال: أفلا جعلتہ فوق الطعام حتی يراه الناس، ثم قال: من غش فليس منا. قال المحشي: أی ليس من أخلاقنا ولا علی سنتنا، قال أبو عيسیٰ: والعمل علی ہذا عند أہل العلم كرہوا الغش وقالوا: الغش حرام. (ترمذی شريف مع الحاشية: ٢٤٥/١، باب ما جاء فی كراہية الغش فی البيوع)

وفی الدر المختار: لا يحل كتمان العيب في مبيع أو ثمن لأن الغش حرام. (الدر المختار: ٤٧/٥، سعيد)

وقال فی المبسوط: قال: اشتره فإنہ لا عيب بہ ثم وجد بہ عيباً كان لہ أن يخاصم فيہ بائعہ. (المبسوط للامام السرخسی: ٩٢/١٣، باب العيوب فی البيوع، ادارة القرآن)

وإذا اطلع المشتري علی عيب فی المبيع فہو بالخيار إن شاء أخذه بجميع الثمن وإن شاء رده. (الہداية: ٤٠/٣، باب خيارالعيب)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

لقولہ عليہ السلام: من باع معيباً لم ينبہ لم يزل في لعنت اللہ ويلعنہ الملائكة.

Rasūlullāh sallallāhu ʿalayhi wa sallam said: The one who sells a defective item without disclosing its defect shall suffer the curses of Allāh taʿālā and the angels forever. Such a person becomes a flagrant sinner. When the buyer comes to know of the defect, he will have the right to return it.[1]

[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 87.

Ahsan al-Fatāwā:

It is harām to conceal the defect in an item.[1]

Allāh taʿālā knows best.

Absolving one's self from all defects in an item

Question

A seller says: "You cannot return this item. I am not responsible for whatever defects it has." Is this permissible?

Answer

It is correct and valid for a seller to absolve himself from all defects in an item. If he says: "I am answerable for the defects in the item but I will not take it back if it does not have a defect," then this is a rejection of *iqālah*, and it is permissible to do this even though it is not the ideal.

الهداية:

ومن باع عبداً وشرط البراءة من كل عيب فليس له أن يرده بعيب وإن لم يسم العيوب بعددها. (الهداية، كتاب البيوع، باب خيارالعيب، ٤٨/٣، وكذا فى المبسوط للامام السرخسى: ٩١/١٢)

شرح المجلة:

إذا باع ماله بشرط براءة ذمته من دعوى كل عيب فلا يكون للمشتري خيار عيب. (شرح المجلة لمحمد خالد الاتاسى، البيوع، الفصل السادس فى خيار العيب، ٣٠٥/٢، رشيدية)

Allāh taʿālā knows best.

The meaning and application of khiyār-e-ghaban

Question

What does *khiyār-e-ghaban* mean and what is its ruling? Is it permissible to return an item?

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[1] *Ahsan al-Fatāwā*, vol. 6, p. 493.

Answer

The word ghaban means "deception". When an item is sold at more than its normal price, the jurists refer to the extra amount as ghaban. It is divided into two categories:

1. Ghaban yasīr (a minor deception). It refers to a price which can be within the limits of the price which is estimated by valuators. For example, an item was bought for ten rupees, while it is valued at eight rupees by some, nine by others, and ten by yet others. It will be classified as a minor deception.

2. Ghaban fāhish (an outrageous deception). It refers to a price which is far beyond what is estimated by valuators. For example, an item was bought for ten rupees, but it is estimated at seven or eight rupees. No one estimates it at more than eight rupees. It will be classified as an outrageous deception.

Some scholars limit the numbers as follows: A five percent increase on movable items. Ten percent for animals. Twenty percent for properties, houses, etc. All these will be classified as ghaban fāhish, and percentages which are lower than these will be ghaban yasīr.

Will a person have the right to return an item if he is deceived in a transaction? The correct and issued verdict is that if ghaban is established in a transaction, the buyer will have the right to return. If there was no ghaban, he must not return the item. ʿAllāmah Shāmī rahimahullāh says that this is the correct view.

الغبن الفاحش ہو ما لا يدخل تحت تقويم المقومين ہو الصحيح كما فى البحر و ذلک كما لو وقع البيع بعشرة مثلاً ثم أن بعض المقومين يقول إنہ يساوي خمسة وبعضہم ستة وبعضہم سبعة، فہذا غبن فاحش لأنہ لم يدخل تحت تقويم أحد بخلاف ما إذا قال بعضہم ثمانية وبعضہم تسعة وبعضہم عشرة، فہذا غبن يسير.

إذا وجد غبن فاحش فى البيع ولم يوجد تغرير فليس للمغبون أن يفسخ البيع ...إذا غر أحد المتبايعين وتحقق أن فى البيع غبناً فاحشاً فللمغبون أن يفسخ البيع حينئذٍ. (شرح المجلة لمحمد خالد الاتاسى، ٢/٣٣٥، ٣٣٧،الفصل السابع فى الغبن والتغرير)

وفى الفقه الحنفى فى ثوبه الجديد: قال: ثم حدد المتأخرون من الفقهاء الغبن الفاحش للتيسير فى الفتوىٰ والقضاء والتطبيق أنه ما بلغ خمس القيمة فى العقار وعشرها فى الحيوان ونصف العشر فى العروض وسائر المنقولات. (الفقه الحنفى فى ثوبه الجديد: ١٩٣/٤، خيار التغرير)

قال فى رد المحتار: قوله لا رد بغبن فاحش... وبه أفتى بعضهم مطلقاً، أى سواء كان الغبن بسبب التغرير أو بدونه لكن هذا الإطلاق لم يذكره فى القنية وإنما حكى فى القنية الأقوال الثلاثة، فى فهم منه أن هذا غير مقيد بالتغرير أو بدونه، ولكن نقل فى الفتح أن الإمام علاء الدين السمرقندي ذكر في تحفة الفقهاء أن أصحابنا يقولون فى المغبون أنه لا يرد لكن هذا في مغبون لم يغر أما في مغبون غر يكون له حق الرد استدلالاً بمسئلة المرابحة... قلت: ويؤيده أيضاً عدم التصريح بالإطلاق فى القولين الأولين، وحيث كان ظاهر الرواية محمولاً على هذا القول المفصل، يكون هو ظاهر الرواية إذ لم يذكروا أن ظاهر الرواية عدم الرد مطلقاً، حتى ينافى التفصيل فلذا جزم فى التحفة بحمله على التفصيل وحينئذ لم يبق لنا إلا قول واحد هو المصرح بإنه ظاهر الرواية، وبأنه المذهب وبأنه المفتىٰ به وبأنه الصحيح فمن أفتى في زماننا بالرد مطلقاً فقد أخطأ خطأً فاحشاً لما علمت من أن التفصيل هو المصحح المفتىٰ به، ولا سيما بعد التوفيق المذكور، وقد أوضحت ذلک بما لا مزيد عليه في رسالة سميتها "تحبير التحرير في إبطال القضاء بالغبن الفاحش بلا تغرير". (فتاوى الشامى: ١٤٣/٥، مطلب فى الكلام على الرد بالغبن الفاحش، سعيد)

Allāh taʿālā knows best.

Cancelling a transaction because of deception

Question

Zayd sold an item to ʿUmar but deceived him either by selling an inferior item to him or by deceiving him about its value. For example,

he said: "This item sells for R1000 in other shops, you can have it for R900." Whereas, the value of that item is only R700. Does the buyer have the right to cancel the transaction in these situations?

Answer

When the buyer was given an inferior item instead of a superior quality one, he was deceived. Since superior and inferior are qualities in the item, and a quality cannot be compared against a price, he does not have the right to have the price reduced. However, because he did not obtain the desired quality, the buyer has the right to return it. If he wants, he may keep the item at its full price or he can return it.

In the second case, he was deceived into paying a higher price. This is a deception and a lie. The buyer has the right to keep the item if he wants or return it; but he has no right to have the price reduced.

ومن اشترى ثوباً على أنه عشرة أذرع بعشرة دراهم، أو أرضاً على أنها مائة ذراع بمائة درهم فوجدها أقل فالمشتري بالخيار إن شاء أخذها بجملة الثمن وإن شاء ترك لأن الذراع وصف فى الثوب ألا ترى أنه عبارة عن الطول والعرض والوصف لا يقابله شيء من الثمن كأطراف الحيوان، فلهذا يأخذه بكل الثمن... إلا أنه يتخير لفوات الوصف المذكور لتغير المعقود عليه فيختل الرضا. (الهداية: ٣/٢٣)

فإن اطلع المشتري على خيانة فى المرابحة فهو بالخيار عند أبي حنيفة إن شاء أخذه بجميع الثمن وإن شاء تركه ...والتولية والمرابحة ترويج وترغيب فيكون وصفاً مرغوباً فيه كوصف السلامة فيتخير بفواته. (الهداية: ٣/٧١، ٧٢)

وفي شرح العناية: قال لأن مطلق العقد يقتضي وصف السلامة أى سلامة المعقود عليه عن العيب لما روي أن رسول الله صلى الله عليه وسلم اشترى من عداء بن خالد بن هوذة عبداً وكتب في عهدته "هذا ما اشترى محمد رسول الله صلى الله عليه وسلم من العداء بن خالد بن هوذة عبداً لا داء ولا غائلة ولا خبثة، بيع المسلم من المسلم." وفي هذا تنصيص على أن البيع يقتضي سلامة المبيع عن العيب، ووصف السلامة يفوت لوجود العيب، فعند فواته يتخير لأن

الرضا داخل في حقيقة البيع، وعند فواته ينفى الرضا فيتضرر بلزوم ما لا يرضى به. (شرح العناية على هامش فتح القدير: ٣٥٤/٦، دار الفكر)

فيض الباري:

في فتح القدير في باب الإقالة أن الغرر، إما قولي أو فعلي، فإن كان الغرر قولياً، فالإقالة واجبة بحكم القاضي، وإن كان الثاني تجب عليه الإقالة ديانة، ولا يدخل فى القضاء كيف! وأن الخدعات أشياء مستورة، ليس إلى علمها سبيل، فلا يمكن أن تدخل تحت القضاء. (فيض الباري: ٢٣١/٣، كتاب البيوع)

Allāh taʿālā knows best.

Repossessing an item when it is not paid for

Question

Zayd bought a machine from ʿUmar and promised to pay for it in instalments of R500 a month. He paid the instalments for some time but then stopped paying. Consequently ʿUmar took the machine back. Will he have to return the money which he collected from Zayd?

Answer

First of all, ʿUmar is the owner of the machine. It was therefore not permissible to take the machine back. If the seller still repossessed the machine on the approval of the buyer, it will fall under the ruling of *iqālah*. When there is *iqālah* and the item is repossessed, it is necessary to return the money. If not, it will mean that one person has taken possession of both the item and its price; and this is against the Sharīʿah law.

البيع مع تأجيل الثمن وتقسيطه صحيح. أى والتأجيل لازم، فليس للبائع حبس المبيع حتى يقبضه ولا المطالبة به قبل حلول الأجل. (شرح المجلة لمحمد خالد الاتاسى، ١٦٦/٢)

We learn from this that when a transaction is agreed upon to be paid in instalments, the buyer becomes the owner of the item. Therefore, the seller cannot take possession of it. If he takes possession of it, it will fall under the ruling of *iqālah*, and it will be necessary to return the money which the buyer had paid.

الإقالة جائزة فى البيع بمثل الثمن الأول... فإن شرطا أكثر منه أو أقل فالشرط باطل ويرد مثل الثمن الأول. (الهداية: ٣/٦٩)

Fatāwā Mahmūdīyyah:

It is not prohibited to have a difference in price for paying cash and taking on credit, but the instalments must be specified. Furthermore, if a certain instalment is not paid on time, there can be no increase on the price nor can the instalments which were paid be appropriated together with the motorcycle. If this is the case, the transaction is not permissible according to the Sharī'ah. In fact, it will entail usury and gambling; and both are explicitly prohibited in the Qur'ān and Hadīth.[1]

Āp Ke Masā'il Aur Oen Kā Hull:

It is not permissible to lay down this condition: If the buyer does not fulfil the three-month instalments, the seller will repossess the vehicle and the instalments which were paid will be forfeited. The seller has the right to collect his instalments through legal means, but he does not have the right to repossess the vehicle nor to appropriate the instalments which were paid.[2]

Ahsan al-Fatāwā:

It is permissible to take a price because of credit, but the precondition of repossessing the item and appropriating all the instalments if the full amount is not paid is an invalid condition. This transaction is therefore not permissible.[3]

Some scholars say that when the buyer does not pay the price, the seller can effect a one-sided cancellation of the transaction and repossess the item. In today's times, this is an easier opinion and it would be better to pass a fatwā on this view.

ومن قال لآخر اشتريت مني هذه الجارية فأنكر الآخر إن أجمع البائع على ترك الخصومة وسعه أن يطأها لأن المشتري لما جحد كان فسخاً من جهته إذا الفسخ يثبت به كما إذا تجاحدا فإذا عزم البائع على ترك الخصومة تم الفسخ

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1 *Fatāwā Mahmūdīyyah*, vol. 16, p. 46.

2 *Āp Ke Masā'il Aur Oen Kā Hull*, vol. 6, p. 154.

3 *Ahsan al-Fatāwā*, vol. 6 ,p. 519.

وبمجرد العزم وإن كان لا يثبت الفسخ فقد اقترن بالفعل وهو إمساك الجارية ونقلها وما يضاهيه ولأنه لما تعذر استيفاء الثمن من المشتري فات رضاء البائع فيستبد بفسخه. (الهداية، ١٤٦/٣، باب التحكيم)

However, another text of *al-Hidāyah* seems to be the opposite:

قال: ومن اشترى عبداً فغاب والعبد في يد البائع وأقام البائع البينة أنه باعه إياه فإن كانت غيبته معروفة لم يبع في دين البائع لأنه يمكن إيصال البائع إلى حقه بدون البيع. (الهداية: ١٠٣/٣، مسائل منثورة)

The buyer disappeared before he could pay the price, and his whereabouts are known. In such a case, it is not permissible to sell the item and collect its price. This is because the seller can collect his dues (through the ruling of a judge).

However, an answer to this is that in this case, it is possible to collect the money because it is easy to do so once the case is presented to a judge. This is not possible nowadays. If the seller opens a case in court, he will have to wait for several years. Also, he will have to bear the expenses for the court case. Therefore, the better option is to effect a one-sided cancellation and repossess the item – as per the previous quotation from *al-Hidāyah.*

<u>H</u>a<u>d</u>rat Muftī Walī <u>H</u>asan <u>S</u>ā<u>h</u>ib ra<u>h</u>imahullāh used to issue the latter fatwā.

Further details on this ruling can be found in the next ruling.

Allāh taʿālā knows best.

A one-sided cancellation when the price is not paid

<u>Question</u>

A person sold his valuable property to someone at a specified price. The buyer promised to pay the amount after six months and made a down payment as a deposit. After six months, he was asked to pay the balance but he has neither paid it nor cancelled the transaction. After a considerable passage of time, the seller cancelled the transaction and sold the property to someone else. Is this permissible?

Answer

In matters of this nature, Hadrat Muftī Walī Hasan Sāhib and Muftī Rashīd Ahmad Ludhyānwī used to issue the verdict of cancelling the transaction. If the buyer neither cancels the transaction nor pays the price, the seller can effect a one-sided cancellation.

On one occasion, the Dār al-Iftā' of Binnaurī Town received a question from Hadrat Hakīm Akhtar Sāhib which is similar to the above situation. The name of the questioner was alluded. Hadrat Muftī Walī Hasan wrote a short answer without any references, and stated that the seller could effect a one-sided cancellation. A few days later, the question was re-posed and it was stated that because Zayd is himself a muftī, he would like references. Hadrat Muftī Walī Hasan quoted the following statement from volume three of *al-Hidāyah*:

ولأنہ لما تعذر استيفاء الثمن من المشتري فات رضا البائع فيستبد بفسخہ.

(الهدايہ: ١٤٧/٣، كتاب ادب القاضى، مسائل شتىٰ من كتاب القضاء)

No further questions were received. This question had been posed by Hadrat Muftī Rashīd Sāhib rahimahullāh. He concurred with the answer and wrote the same ruling in his *Ahsan al-Fatāwā*, vol. 6, p. 506.

Although the author of *al-Hidāyah* wrote the above with reference to a specific issue, it is considered to be a principle.

Objection

An objection is made to the above.

In the issue which mentions a one-sided cancellation, the buyer is denying the transaction. This is why the seller can effect a one-sided cancellation. This is because the transaction has terminated from the side of the buyer. Whereas the author of *al-Hidāyah* writes on the same page [under discussion]:

لأن أحد المتعاقدين لا يتفرد بالفسخ. (الهداية: ١٤٧/٣، مسائل شتىٰ من كتاب القضاء)

Similarly, it is stated in *Sharh al-Majallah* (vol. 2, p. 258) that where the other party affirms the transaction but does not pay the money, the opposing party cannot cancel the transaction.

Furthermore, the following is stated in *Badā'i' as-Sanā'i'*:

ونوع لا يرتفع إلا بالإقالة وهو حكم كل بيع لازم وهو البيع الصحيح الخالي عن الخيار. (بدائع الصنائع: ٣٠٦/٥، سعيد)

The honourable Hadrat Maulānā Muftī Muhammad Taqī ʿUthmānī also wrote in the same vein. That is, a one-sided cancellation is not possible.

Answer

If one ponders over the text of *al-Hidāyah* and observes it in the light of its annotators, it becomes absolutely clear that the fundamental basis is on the collection of the money. If it is not possible to collect the money or extremely difficult to do so, a one-sided cancellation will be permissible.

لما تعذر استيفاء الثمن يستبد وههنا لما أقر المشتري في مكانه بالشراء لم يتعذر الاستيفاء فلا يستبد بالفسخ. (العناية على هامش فتح القدير: ٣٣٤/٧، دار الفكر)

In other words, if the buyer attests to the price, it is possible to collect it. This is why a one-sided cancellation cannot be effected. There was an Islamic judicial system in the past, and a person who was wronged could easily claim his right and the price could be recovered. Nowadays, the constant delaying and deferring has made it almost impossible to recover the price. Going to the court will result in nothing but regret. It is synonymous to placing one's self into distress for many years.

The above-quoted text of *Badā'i'* which states that in a binding transaction, the only way of termination is *iqālah* (cancellation), then this is practical in normal conditions. But where it is not possible to recover the price or item, a one-sided cancellation is possible. If in a transaction, a slave runs away before he can come into the possession of the buyer, then although the transaction was completed, a judge can annul the transaction. As stated in *ad-Durr al-Mukhtār* (vol. 4, p. 292).

Although Hadrat Muftī Muhammad Taqī ʿUthmānī Sāhib did not consider a one-sided annulment to be permissible in the above-mentioned issue, we learn of its permissibility from one of his other books:

فإن الخادع يجب عليه ديانة أن يفسخ البيع أو يقيل المخدوع إذا طلب منه الإقالة وقد صرح به فى الدر المختار والشامى. (تكملة فتح الملهم: ٣٣٣/١)

He states in *Taqrīr Tirmidhī*:

However, the latter day Hanafī jurists issue a verdict on the basis of Mālikī jurisprudence because of the proliferation of deception and cheating in our times… Therefore, if a person resorts to deception a buys an item at a lower price or sells it at a higher price, then the one who suffered the deception ought to receive the right of revocation – as in the jurisprudence of Imām Mālik rahimahullāh. Thus, nowadays the fatwā is issued on the basis of Mālikī jurisprudence. Therefore, the one who was cheated will have *khiyār-e-maghbūn* (the right of the one who has been defrauded).[1]

ʿAllāmah Anwar Shāh Kashmīrī writes:

إن الغرر إما قولي أو فعلي فإن كان الغرر قولياً فالإقالة واجبة بحكم القاضي وإن كان الثاني تجب عليه الإقالة ديانة،... وبهكذا أقول فيما إذا اشترى سلعة، فلم يؤد ثمنها حتى أفلس، أنه يكون فيه أسوة للغرماء عندنا قضاءً، ويجب عليه أن يرد المبيع إلى البائع خفيةً ديانةً، فإنه أحق به، لكنه حكم الديانة دون القضاء. (فيض البارى: ٢٣٢/٣)

Allāh taʿālā knows best.

When an item is destroyed before the buyer can take possession of it

Question

A man bought an item. It got destroyed along the way, before it could reach him. Who will pay its compensation?

Answer

As long as the buyer does not take possession of it – as per societal norms – it will be considered to be in the ownership of the seller. In the case where it is destroyed, the seller will have to pay compensation. Yes, if – as per societal norms - the buyer is considered

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[1] *Taqrīr Tirmidhī*, vol. 1, p. 169.

to have taken possession of it, and then it was destroyed, then the onus will be on the buyer.

<u>فتاوی الشامی:</u>

تفید الملک بالقبض أی یثبت بالبیع أو بالشراء. (فتاوی الشامی: ٦/١٣٠، کتاب الاکراه)

<u>شرح المجلة:</u>

المبيع إذا هلك في يد البائع قبل أن يقبضه المشتري يكون من مال البائع ولا شيء على المشتري... وإذا هلك المبيع بعد القبض هلك من مال المشتري ولا شيء على البائع. (شرح المجلة لمحمد خالد الاتاسی، ٢/٢٢٣، ٢٢٥)

Jadīd Fiqhī Mabā<u>h</u>ith:

The Qur'ān and Sunnah do not explain any particular manner of taking possession. In fact, the A<u>h</u>ādīth mention several ways of it. A narration of <u>H</u>a<u>d</u>rat ʿAbdullāh ibn ʿUmar ra<u>d</u>iyallāhu ʿanhu states that possession is realized when the item is moved from the place of purchase to another place. A narration of <u>H</u>a<u>d</u>rat Zayd ibn Thābit ra<u>d</u>iyallāhu ʿanhu states that this happens when traders move their purchased items to the saddles of their camels. A narration of <u>H</u>a<u>d</u>rat Abū Hurayrah ra<u>d</u>iyallāhu ʿanhu classifies the measuring and weighing of an item as "taking possession" of it. This is why the jurists concur that the societal norms will be the criteria. The extent of control over an item which is considered to be "taking possession" of it will be accepted by the Sharīʿah as taking possession with respect to that item.

ʿAllāmah Kāsānī ra<u>h</u>imahullāh writes:

ولا يشترط القبض بالبراجم، لأن معنى القبض هو التمكين والتخلي وارتفاع الموانع عرفاً وعادة حقيقة. (بدائع الصنائع: ٥/١٤٨، سعيد. الفتاوى الهندية: ٣/١٦.[1]

[1] *Jadīd Fiqhī Mabā<u>h</u>ith*, vol. 2, p. 151.

Fiqhī Maqālāt:

The Sharī'ah rules that risk is not transferred merely by the completion of a transaction and the transfer of ownership, until and unless the buyer takes possession of it. Thus, if the buyer or his representative does not take possession of the item – whether taking possession is in reality or based on societal norms – compensation for it will not be transferred to the buyer.[1]

Islām Aur Jadīd Maʿāshī Masā'il:

The seller absolves himself by saying to the buyer: "This wheat which you bought is in my warehouse. You may take it whenever you want. After today, I am not responsible for it. If the wheat is destroyed or gets rotten, it is your responsibility." In such a case, although the buyer did not take physical possession of his goods, they have come under his liability. Any losses suffered to them will be to the buyer's liability. Imām Abū Hanīfah rahimahullāh is of the view that physical possession is not necessary. Takhliyah is sufficient. Takhliyah means that the buyer is given the power to come and take possession of the item whenever he wants. As long as no obstacle from taking possession of it remains, we will conclude that takhliyah has taken place. For example, there is a chest which contains several items. The buyer is given the key to it. Once he receives the key, possession of the chest has taken place irrespective of whether he takes the chest now or not. Imām Bukhārī rahimahullāh gives preference to the view of Imām Abū Hanīfah rahimahullāh and narrates the tradition of Hadrat Jābir radiyallāhu ʿanhu as a mausūl narration. Rasūlullāh sallallāhu ʿalayhi wa sallam bought a camel from Hadrat Jābir radiyallāhu ʿanhu who then travelled on it to Madīnah. He did not get off that camel, but takhliyah was established. Imām Bukhārī rahimahullāh says that we learn from this incident that possession takes place once takhliyah is effected.[2]

Further reading: *ʿItr Hidāyah*, pp. 88-91; *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, pp. 40-42; *Qāmūs al-Fiqh*, vol. 4, pp. 466-467.

To sum up, after the buyer takes possession of the item, it comes under his control and he will be responsible for it. The seller will be responsible before the buyer takes possession. Taking possession is based on societal norms. These differ with respect to the nature of the items.

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[1] *Fiqhī Maqālāt*, vol. 3, p. 73.

[2] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 2, pp. 98, 100.

Allāh ta'ālā knows best.

Selling a property which belongs to a minor

Question

The guardian of a minor sold the latter's property for whatever reason. Is this permissible?

Answer

If the guardian is known to have affection for the minor, or it is unknown but he sold it after bearing in mind the interests of the minor, then it is permissible.

فتاوى الشامى:

ولو البائع أباً فإن محموداً عند الناس أو مستور الحال يجوز، ابن كمال، وقال فى الشامية: قوله يجوز فليس للصغير نقضه بعد بلوغه إذ للأب شفقة كاملة ولم يعارض هذا المعنى معنى آخر فكان هذا البيع نظراً للصغير وإن كان الأب فاسداً لم يجز بيعه العقار فله نقضه بعد بلوغه هو المختار إلا إذا باعه بضعف القيمة إذ عارض ذلك المعنى معنى آخر، تنبيه: ظاهر كلامهم هنا أنه لا يفتقر بيع الأب عقار ولده إلى المسوغات المذكورة فى الوصي ونقل الحموي في حواشى الأشباه من الوصايا أن الأب كالوصي لا يجوز له بيع العقار إلا فى المسائل المذكورة كما أفتى به الحانوتي. ثم رأيت في مجموعة شيخ مشايخنا منلا على التركماني قد نقل عبارة الحموى المذكورة ثم قال ما نصه: وهو مخالف لإطلاق ما فى الفصول وغيره ولم يستند الحانوتي في ذلك إلى نقل صحيح ولكن إذا صارت المسوغات في بيع الأب أيضاً كما فى الوصي صار حسناً مفيداً أيضاً لأن الأخذ بالاتفاق أوفق هكذا أفادنيه شيخنا الشيخ محمد مراد السقاميني رحمه الله تعالى. (فتاوى الشامى: ٦/٧١١، سعيد)

الهداية:

ولا يجوز بيع الوصي ولا شراؤه إلا بما يتغابن الناس في مثله لأنه لا نظر فى الغبن الفاحش بخلاف اليسير لأنه لا يمكن التحرز عنه ففي اعتباره انسداد بابه. (الهداية: ٦٩٨/٤، باب الوصى وما يملكه)

وفى الشامي: قوله ولو مصلحاً إنما ذكره لأنهم صرحوا بأن شرط بيع الأب عقار الصغير بمثل القيمة كونه محموداً أو مستوراً فلو كان مفسداً لا يجوز إلا بضعف القيمة. (فتاوى الشامى: ٤٢٦/٥، سعيد)

وفيه أيضاً: قوله وعلى قول المتأخرين أى في وصي اليتيم أنه ليس له بيع العقار إلا فى المسائل السبع الآتية وهو المفتىٰ به وعند المتقدمين له البيع مطلقاً، واختاره الاسبيجابي وصاحب المجمع وكثير كما فى التحفة المرضية قوله سبع مسائل ونصه وجاز بيعه عقار صغير من أجنبي لا من نفسه بضعف قيمته أو لنفقة الصغير أو دين الميت أو وصية مرسلة لا إنفاذ لها إلا منه أو تكون غلته لا تزيد على مؤنته أو خوف خرابه أو نقصانه أو كونه في يد متغلب. (فتاوى الشامى: ١٨٣/٤، باب العشر والخراج، سعيد)

وللاستزادة انظر: الفتاوى الخانية على هامش الهندية: ٥١٧/٣. وشرح العناية: ٥٨٨/١٠)

After quoting the text of Shāmī ra<u>h</u>imahullāh, <u>H</u>a<u>d</u>rat <u>H</u>akīm al-Ummat ra<u>h</u>imahullāh writes:

This narration proves that in itself, it is not permissible for the mother to sell the property of a minor. Instead, when there is a need, she will have to revert to a Muslim judge. I have not come across a ruling in the case where there is no Muslim judge. However, since the need is genuine and inconvenience is removed, it seems that it will be permissible at the time of necessity.[1]

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[1] *Imdād al-Fatāwā*, vol. 3, p. 25.

Allāh ta'ālā knows best.

Trading in greeting cards

<u>Question</u>

Like we have 'īd cards, Christians use birthday cards, mother's day cards, etc. They are also known as greeting cards. Can Muslims trade in these cards? Some of these cards contain small images of animate objects.

<u>Answer</u>

It is permissible to trade in cards of this nature because the images are not the objective; they are subservient to the message. This is similar to images which we see on the labels of many items. The jurists say that it is permissible to trade in them without any reprehensibility. However, one should be careful about covering items having images in one's business or house so that one will not be acting against the Hadīth in this regard.

قال في رد المختار: لكن فى الخزانة إن كانت الصورة مقدار طير يكره وإن كانت أصغر فلا. (رد المحتار: ٦٤٨/١، سعيد)

Based on the above principle, since trading in the card is the objective and not the image, it is not impermissible.

The jurists give the same ruling with regard to trading in grape juice:

وذكر قاضيخان في فتاواه أن بيع العصير ممن يتخذ خمراً إن قصد به التجارة فلا يحرم وإن قصد به لأجل التخمير حرم. (الاشباه والنظائر: ١٠٢/١)

Kifāyatul Muftī:

It is not permissible to trade in images of animate things irrespective of whether they are small or large in size, and whether they are toys for children or for some other purpose. However, if the object is not to trade in the image, e.g. a matchbox has an image of an animal, but it is not the objective to sell the image [but the matches], then it can be permissible to trade in such items.[1]

Question: A roll of fabric contains the company label which has an image of an animate object on it, or a carton has a similar image but it

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[1] *Kifāyatul Muftī*, vol. 9, p. 235.

contains trade goods inside. If that roll of fabric or carton is stored in one's shop, will it be considered to be a display of animate objects?

Answer: Since it is not the objective to trade in the images, there is leeway on the basis of necessity.[1]

ʿIṯr Hidāyah:

...if such an image is on a book, utensil, etc. and this increases the value or interest in the item, then it is makrūh. Even if it does not create an interest, it is not free from detestability. Yes, if it is difficult to save one's self from these images, e.g. on coins, money, paper, tickets, cards on which images are printed, then the one who had them printed will be sinning. The general public will not be sinful.[2]

Āp Ke Masā'il:

Question: How should newspapers containing images be brought into a house?

Answer: It was the practice of some of our seniors to first cover the images. Others used to place their hands over the images. For people like us, it will be a boon if we could just read the newspapers and fold them away without displaying the images.[3]

Kitāb al-Fatāwā:

Unfortunately, nowadays, images are attached to labels to which the images have no connection whatsoever. When a label is removed, the genuineness of the item is doubted. The image is not the objective when trading in the item, the actual item is the objective. In the present circumstances, it will be permissible to trade in such items. However, it is the duty of Muslim manufacturers to abstain from resorting to these ignoble means to make their goods appealing. Instead, they should divert the attention of people to the quality and excellent features of their goods.[4]

Allāh taʿālā knows best.

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[1] *Kifāyatul Muftī*, vol. 9, p. 241.

[2] *ʿIṯr Hidāyah*, pp. 153-154.

[3] *Āp Ke Masā'il Aur Oen Kā Hull*, vol. 7, p. 68.

[4] *Kitāb al-Fatāwā*, vol. 5, p. 209.

Trading in garments which have animate images

Question

Can a person sell garments which have animate images to non-Muslims?

Answer

The Sharīʿah prohibits trading in pictures, images and figurines of animate objects. Trading in statues and figurines is impermissible. In the same way, trading in an image which is the object of the sale is impermissible. However, the labels on garments which have images are not generally the objective. It is the garment or that item which is the objective. This is why we will not say that it is impermissible to trade in them. Selling them to non-Muslims makes the issue lighter because they are not addressed with regard to subsidiary matters of Dīn. Yes, one ought to abstain from trading in garments having large images which are sold as fashion, and where the image is the objective.

عن جابر رضي الله عنه قال نهى رسول الله صلى الله عليه وسلم عن الصورة فى البيت ونهى أن يصنع ذلک، حديث جابر رضي الله عنه حديث حسن صحيح. (رواه الترمذى فى باب ما جاء فى الصورة: ١/٣٠٥)

ʿItr Hidāyah:

A Hadīth curses the person who makes images of animate things. Rasūlullāh sallallāhu ʿalayhi wa sallam said that the angels of mercy do not enter the house which has dogs and images. (*Mishkāt*)

Rasūlullāh sallallāhu ʿalayhi wa sallam said that Allāh taʿālā says: "Who can be more unjust than the one who imitates Me in the creation." I challenge him to create an ant or a grain of wheat." (*Mishkāt* as quoted from *Bukhārī* and *Muslim*)

Hadrat ʿĀ'ishah radiyallāhu ʿanhā narrates that Rasūlullāh sallallāhu ʿalayhi wa sallam would not allow items with images to lie around in the house. (*Bukhārī* and *Muslim*)

Creating an image, getting it created, trading in it – whether hand-drawn or a duplication, in statue form or embossed, whether the face only or the entire body – is a major sin. It is harām. If such an image is on a book, utensil, etc. and this increases the value or interest in the item, then it is makrūh. Even if it does not create an interest, it is not free from detestability. Yes, if it is difficult to save one's self from these images, e.g. on coins, money, paper, tickets, cards on which images are

printed, then the one who had them printed will be sinning. The general public will not be sinful.[1]

Some people furnish the following narration of *Tirmidhī:*

وعن عبيد الله بن عبد الله بن عتبة أنه دخل على أبي طلحة الأنصاري رضي الله عنه يعوده فوجد عنده سهل بن حنيف رضي الله عنه قال: فدعا أبو طلحة رضي الله عنه إنساناً ينزع نمطاً تحته فقال له سهل لم تنزعه، قال: لأن فيها تصاوير وقال فيه النبي صلى الله عليه وسلم ما قد علمت، قال سهل رضي الله عنه: أو لم يقل إلا ما كان رقماً في ثوب قال: بلى ولكنه أطيب لنفسي، هذا حديث حسن صحيح. (رواه الترمذى: ٣٠٥/١)

قال ابن بطال: اختلف العلماء فى الصور فكره ابن شهاب ما نصب منها وما بسط كان رقماً أو لم يكن، على حديث نافع عن القاسم عن عائشة رضي الله تعالىٰ عنها، وقال طائفة: إنما يكره من التصاوير ما كان في حيطان البيوت، وأما ما كان رقماً في ثوب فهو جائز على حديث زيد بن خالد عن أبي طلحة رضي الله عنه، وسواء كان الثوب منصوباً أو مبسوطاً وبه قال القاسم. (شرح صحيح البخارى لابن بطال: ١٧٩/٩، كتاب اللباس، باب من كره القعود على الصور)

Fatāwā Mahmūdīyyah:

It is not permissible to buy books and magazines which are bought because of the images which they contain. This is because the objective is taken into account. If the objective is to read proper articles, it will be permissible to buy them. The images are subordinate to the articles, and they should be obliterated.

Taswīr Ke Shar'ī Ahkām:

If images are not the objective in a transaction but are subordinate to other things, e.g. most garments have images, utensils and other goods commonly have images – then their trade is subordinately permissible.

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[1] *'Itr Hidāyah*, pp. 153-154.

كما يستفاد من بلوغ القصد والمرام معزياً للهيثمي (بلوغ المرام: ص ١٨) ولما هو من القواعد المسلمة من فقه الأحناف أن كثيراً من الأفعال لا يجوز قصداً ويجوز تبعاً كما صرحوا في جواز بيع الحقوق تبعاً للدار ولا أصالة وقصداً.

However, if the images are the objectives of a trade, it will be impermissible to buy and sell them. If an image is made of clay, then its value is not obligatory on anyone. If it is made of metal or wood, only that amount will be obligatory which makes up the metal or wood, while disregarding the actual image itself.[1]

Further reading: *Kitāb al-Fatāwā*, vol. 5, p. 265; *Imdād al-Ahkām*, vol. 3, p. 384; *Jawāhir al-Fatāwā*, vol. 3, p. 227 (Muftī Muhammad ʿAbd as-Salām Chātgāmī); *Taswīr Ke Sharʿī Ahkām*)

Allāh taʿālā knows best.

Trading in opium

Question

Is it permissible to trade in opium?

Answer

It is permissible to trade in opium. It does not fall exactly under the ruling of alcohol. It has benefits; it is used in medicines, etc. The principle is that if something has a lawful use, then trading in it is permissible. Yes, if one is convinced that the person who is buying it will use it in an impermissible manner, then it is makrūh to sell it to him.

وصح بيع غير الخمر ومفاده صحة بيع الحشيشة والأفيون. وفى الشامية: قوله وصح بيع غير الخمر أى عنده خلافاً لهما فى البيع والضمان، لكن الفتوىٰ على قوله فى البيع. (الدر المختار مع فتاوى الشامى: ٤٥٤/٦، كتاب الاشربة، سعيد)

وفي حاشية الطحطاوي على الدر: ويجوز بيعها ويضمن متلفها قيمتها عنده وقالا: لا يجوز البيع ولا يضمن المتلف وعن أبي يوسف يجوز بيعها إذا طبخ

[1] Muftī Muhammad Shafīʿ: *Taswīr Ke Sharʿī Ahkām*, p. 88.

فذہب أكثر من النصف وأقل من الثلثين والفتوىٰ على قولہ فى البيع. (حاشية الطحطاوى على الدر المختار: ٤/٢٢٥، كوئٹہ)

Kifāyatul Muftī:

The buying and selling of opium is permissible even though the law of the country is that it can be sold only if a person has a licence. The Sharī'ah does not lay down this condition. The income which is derived from its sale is permissible and halāl.[1]

Ahsan al-Fatāwā:

In the past, opium was rarely used for medical treatment. Instead, it was used mostly as an intoxicant. This is why some jurists say that it is makrūh to trade in it. Nowadays, it is used profusely for medical treatment and has acquired much prominence and popularity. In fact, it has reached the level of necessity. Therefore, it is permissible to trade in it without any reprehensibility. However, if one is quite convinced that a certain person will use it as an intoxicant, it will be makrūh tahrīmī to sell it to him.[2]

Muftī Taqī 'Uthmānī writes:

A principle related to trade and commerce is that if something has a lawful use, trading in it will be permissible even if it is generally used for impermissible things. In other words, it is the duty of the buyer to use it for the correct purpose.[3]

Opium is an intoxicant, and is generally used in impermissible ways. However, it is permissible to trade in it because it is possible to use opium in lawful ways. In other words, in medicines, for medical treatment, external treatment in the form of a paste, etc. Since it can be used in these lawful ways, it is permissible to trade in it.[4]

Further reading: *Fatāwā Mahmūdīyyah*, vol. 16, p. 123.

Allāh ta'ālā knows best.

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[1] *Kifāyatul Muftī*, vol. 9, p. 124.

[2] *Ahsan al-Fatāwā*, vol. 6, p. 494.

[3] *Islām Aur Jadīd Ma'āshī Masā'il*, vol. 4, p. 17.

[4] Ibid. vol. 4, p. 13.

Reserving certain sale items for one's self

Question

A person purchases a shopping complex from someone. At the time of the sale agreement, the seller lays down this condition: "In this shopping complex, I will receive one shop which will be rent-free." Is it permissible to lay down a condition of this nature?

Answer

A pre-condition which is not in line with the transaction renders the transaction invalid. The above-described transaction is invalid. Yes, a permissible way to do this will be to sell the entire complex while excluding one particular shop. That one shop will belong to the seller, while the remaining shops will belong to the buyer. The seller can then use that shop as his own. There will be no rental for it. This is similar to selling a heap of fruit while excluding ten kilos for one's self. This is permissible.

ولا يجوز أن يبيع ثمرة و يستثنى منها أرطالاً معلومة خلافاً لمالک لأن الباقي بعد الاستثناء مجهول بخلاف ما إذا باع واستثنىٰ نخلاً معيناً لأن الباقي معلوم بالمشاهدة قال: قالوا: هذه رواية الحسن وهو قول الطحاوي، أما على ظاهر الرواية ينبغي أن يجوز لأن الأصل أن ما يجوز إيراد العقد عليه بانفراده يجوز استثناؤه من العقد وبيع قفيز من صبرة جائزة فكذا استثناؤه. (الهداية: ٢٧/٣، كتاب البيوع)

وللاستزادة: انظر فتاوى الشامى: ٥٥٩،٥٥٨/٤، سعيد. والقول الراجح: ٢:١٠)

'Allāmah Shāmī rahimahullāh provides another way in which it can be made permissible. He quotes this from *Jāmi' al-Fusūlayn*:

After the transaction is complete, the seller takes a promise from the buyer that he will give him one shop rent-free. If the buyer agrees to it, it will become necessary for him to give the seller the shop. It is obligatory to fulfil a promise of this nature.

وقال فى شرح المجلة: فلو ألحق الشرط الفاسد بالعقد، قيل: يلتحق عند الإمام وقيل: لا، وهو الصحيح. نقل (ابن عابدين) عن جامع الفصولين أيضاً

أنہ لو ذكر البيع بلا شرط، ثم ذكر الشرط على وجہ العدة جاز البيع ولزم الوفاء بالوعد، إذ المواعيد قد تكون لازمة، فيجعل لازماً لحاجة الناس، ويظهر لي أنہ متى وقع الشرط بعد العقد لا يكون إلا على وجہ العدة، وحكمہ أنہ يجب الوفاء بہ. (شرح المجلة لمحمد خالد الاتاسى، فصل فى حق البيع بشرط: ٢/٦٠)

Allāh taʿālā knows best.

Cancelling a transaction when the value of an item increases

Question

A man was in severe need, so he sold one of his houses to his sister and brother-in-law in the presence of his wife and three of his brothers. He sold it for R220 000 cash. The matter was then taken to al-Barakah Bank which asked for the title-deeds and other papers. Because these could not be presented, the entire amount could not be paid and al-Barakah Bank refused to handle the transaction. The buyer and seller made an arrangement between themselves. The buyer paid R50 000 in cash, with the balance to be paid in instalments. The monthly instalment figure was not specified; it was left to the good intent of the buyer. The seller refused to accept any instalment in April 2008. However, when the buyer sent a cheque on 25 April via a bank, the seller accepted it. He now says that the amount [which they had agreed upon] is very little because the value of the house has increased. He is therefore not happy with the original price. The buyer has already paid five instalments, and has only R40 000 left to pay.

Who is the owner of the house according to the Sharīʿah? Does the seller have the right to cancel the transaction?

Answer

The offer and acceptance were concluded by the agreement of both parties. The transaction was therefore completed and the buyer became the owner of the house. The seller does not have the right to cancel it. The seller had himself agreed to receive the agreed-upon-amount in instalments. Because al-Barakah Bank asked for the papers which the seller did not have, the entire amount was not collected.

The prices of properties, houses, lands and other essentials – in fact, even items for personal use – increase by the day and become more expensive. This does not mean that when the price increases, the house which was sold can be taken back. Rather, the price which was agreed upon will remain until the entire amount is paid.

When there is an agreement for a sale, the market value is considered. If the value increases or decreases after the transaction, it will not affect the agreement in any way. Rather, the price which both parties had agreed upon will be considered. This is irrespective of whether the market value has increased or dropped. The instalments will also be paid according to the agreed price; they will not be changed. If the buyer pays more, it will be his favour and it is permissible. Apart from this, the seller does not have the right to demand more than the agreed price.

The seller left the instalments to the good intent of the buyer and did not specify a time limit. Even then, the transaction is valid and correct. The buyer will have the choice of paying whatever amount he wants on a monthly basis. However, he will have to pay some amount or the other. Yes, it is necessary to specify the full amount at the time of the transaction so that there are no disputes later on. In this case, the full price of R220 000 was specified, so the transaction is valid and correct.

After receiving five instalments and only R40 000 remaining, the seller says: "I am not happy", then this is not right. It will not affect the transaction and agreement in any way.

Refer to the following proofs:

> يأَيُّهَا الَّذِيْنَ امَنُوْا لاَ تَأْكُلُوْآ أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلاَّ أَنْ تَكُوْنَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ
>
> O believers! Do not devour the wealth of each other among yourselves wrongfully unless it be a transaction by mutual consent.[1]

صحيح البخارى:

حدثنا أبو النعمان قال حدثنا حماد بن زيد قال حدثنا أيوب عن نافع عن ابن عمر رضى الله تعالىٰ عنهما قال قال النبي صلى الله عليه وسلم: البيعان بالخيار ما لم يتفرقا أو يقول أحدهما لصاحبه اختر وربما قال: أو يكون بيع خيار.

[1] Sūrah an-Nisā', 4: 29.

(صحيح البخارى: ٢٨٣/١، باب من لم يوقت الخيار هل يجوز البيع، كتاب البيوع)

عمدة القارى:

أى بخيار البيعين ما لم يتفرقا، قال عبد الله بن عمر بن الخطاب رضي الله عنه وقد مضى أن ابن عمر رضي الله عنه كان اذا اشترى شيئاً يعجبه فارق صاحبه، وروى الترمذي من طريق ابن فضيل عن يحي بن سعيد: وكان ابن عمر رضي الله عنه إذا ابتاع بيعاً وهو قاعد قام ليجب له، وقد ذكرنا عن مسلم نحوه. (عمدة القارى: ٣٨٥/٨، كتاب البيوع، دار الحديث، ملتان)

ترمذى شريف:

ومعنى قول النبي صلى الله عليه وسلم إلا بيع الخيار معناه أن يخير البائع المشتري بعد إيجاب البيع فإذا خيره فاختار البيع فليس له خيار بعد ذلك في فسخ البيع وإن لم يتفرقا هكذا فسره الشافعي وغيره. (ترمذى شريف: ١٥٠/١، باب ما جاء البيعان بالخيار ما لم يتفرقا)

We learn from the above narration and its commentary that once there is mutual agreement on a transaction, neither of the parties has the right to cancel it.

الهداية:

وإذا حصل الإيجاب والقبول لزم البيع ولا خيار لواحد منهما إلا من عيب أو عدم رؤية. (الهداية: ٢٠/٣، كتاب البيوع)

ولا يجوز البيع إلى قدوم الحاج وكذلك إلى الحصاد والدياس... إلى قوله بخلاف ما إذا باع مطلقاً ثم أجل الثمن إلى هذه الأوقات حيث جاز لأن هذا تأجيل فى الدين وهذه الجهالة فيه متحملة. (الهداية: ٦١/٣، باب البيع الفاسد)

شرح المجلة:

وفي جامع الفصولين: الرواية المحفوظة أنہ لو باع مطلقاً ثم أجل الثمن إلى حصاد ودياس لا يفسد ويصح الأجل، ووجهوه بأن التأخير بعد البيع تبرع فيقبل التأجيل إلى الوقت المجهول. (شرح المجلة لمحمد خالد الاتاسى، ٢/١٦٨، الفصل الثانى فى بيان المسائل المتعلقة بالبيع بالنسيئة والتأجيل، كوئتہ)

Fiqhī Maqālāt:

A transaction where the item is paid for in instalments means that the seller gives over his goods to the buyer there and then, but the buyer does not pay its price immediately. Rather, he pays it in instalments over a period and an amount which is agreed upon. If this is found in a transaction, it will be referred to as *bay' bi at-tasqīṯ*. The item on which the transaction is based could be priced on the current market value, more than it or less.[1]

Jadīd Fiqhī Masā'il:

An item could be sold on credit – to be paid in instalments – or it could be paid all at once at a later date. The only requirement is that the period of repayment and the amount to be paid must be made so clear that there remains no possibility of a dispute. Credit transactions and payment in instalments have become extremely common nowadays; they were probably never so common in the past. Despite this, the jurists of the past make reference to repayment in instalments. 'Allāmah Shāmī raḫimahullāh makes reference to one such transaction as follows:

ومن باع سلعة بثمن على أن تعطينى كل يوم درہماً وكل يوم درہمين. (منحة الخالق، ٥/٢٨٠)

'Allāmah Shāmī raḫimahullāh makes reference to several other transactions of this nature. Even Imām Shāfi'ī raḫimahullāh (150-204 A.H.) writes:

[1] *Fiqhī Maqālāt*, vol. 1, p. 82, Memon Islamic Publishers.

ومن كانت عليه دنانير منجمة أو دراهم فأراد أن يقبضها جملة فذلك له. (كتاب الام، ٣/٣٣)

In short, transactions where the repayment is done in instalments is undoubtedly permissible in the light of the general principles of the Sharīʿah. There seems to be no difference of opinion among the jurists on this issue.[1]

Allāh taʿālā knows best.

Selling grass which grows on its own

Question

A person has grass on his land or farm which grows on its own. Another person needs the grass and wants to buy it. Is it permissible to sell such grass while it is still in the ground?

Answer

It is not permissible to sell grass which grows on its own. Rasūlullāh sallallāhu ʿalayhi wa sallam said:

> الناس شركاء في ثلاث: فى الكلأ والماء والنار.
>
> Everyone has equal right to benefit from three things: water, grass and fire.

However, if a farmer constantly irrigates the farm or he engages in grass farming as a business [e.g. those who have "instant lawn" businesses], then it will be permissible to sell it.

وعن رجل من الصحابة رضي الله عنهم: قال: غزوت مع النبي صلى الله عليه وسلم فسمعته يقول: الناس شركاء في ثلاث:فى الكلأ والماء والنار. رواه أحمد وأبو داود ورجاله ثقات. (بلوغ المرام، ص ٢٧٢، باب احياء الموات)

[1] *Jadīd Fiqhī Masā'il*, vol. 4, p. 256.

مجمع الانهر:

ولا يجوز بيع المراعي -المراد بالمرعى الكلأ النابت في أرض غير مملوكة أو في أرض البائع بدون تسبب منه، قيدنا به لأنه لو تسبب في ذلك بأن سقى الأرض أو هيأها للإنبات جاز له بيع كلئها لأنه ملكه. (مجمع الانهر: ٥٧/٢)

الهداية:

ولا يجوز بيع المراعي ولا إجارتها، والمراد الكلأ أما البيع فلأنه ورد على ما لا يملكه لاشتراك الناس فيه بالحديث. (الهداية: ٥٤/٣)

ʿAllāmah ʿAbd al-Hayy Lucknowī rahimahullāh (1264-1304 A.H.) writes in the marginalia of *al-Hidāyah:*

أما الحشيش الذي أنبته صاحب الأرض بأن سقى أرضه وكربها فأنبت الحشيش فيها لدوابه فهو أحق بذلك وليس لأحد أن ينتفع به إلا برضاه لأنه حصل بكسبه والكسب للمكتسب. (حاشية الهداية:٤٨٥/٤، رقم الحاشية: ٥)

وللاستزادة انظر: الفتاوى الهندية: ١٠٩/٣. والمحيط البرهانى: ٢٩١/٧. وتبيين الحقائق: ٣٧١/٤. والبحر الرائق: ١٢٧/٦، رشيديه. وفتح القدير: ٥٦/٦، دار الفكر)

Hadrat Muftī Muhammad Shafīʿ Sāhib (1314-1396 A.H.) writes:

As regards grass which grows on its own from rain water, it does not belong to the owner of the land before it is cut. It is not permissible for him to stop people from cutting it, to guard it through his employees, or to stop them from cutting it. Since this grass does not belong to him, it is not permissible for him to sell it. However, he may sell it after he cuts it. He could rent out the land for the pitching of tents or for some other purpose, and he may then take a rental for the land equivalent to the amount which he wants to collect for the grass.

قال فى الدر المختار فى البيوع الفاسدة...ثم قال وحيلته أن يستأجر الأرض لضرب قسطاطه أو لإيقاف دوابه أو لمنفعة أخرى.[١]

Fatāwā Mahmūdīyyah:

Grass which grows on its own cannot be sold without having cut it first. For example, allowing cows to graze on that land and taking a payment for it. A transaction like this is not permitted in the Sharīʿah.[2]

Allāh taʿālā knows best.

The right of a characteristic

Question

A person bought a parrot on the condition that it can speak, but it turned out that it cannot. Can the buyer return it? Is it permissible for him to ask for a reduction in the price [because it cannot speak]?

Answer

If an item does not have a characteristic which is desired in it, the buyer has the choice of keeping the item at the full price or returning it. He cannot ask for a reduction in the price because a price is not in exchange for a characteristic.

الهداية:

ومن باع عبداً على أنه خباز أو كاتب وكان بخلافه فالمشتري بالخيار إن شاء أخذه بجميع الثمن وإن شاء ترك لأن هذا وصف مرغوب فيه فيستحق فى العقد بالشرط ثم فواته يوجب التخيير... وإذا أخذه أخذه بجميع الثمن لأن الأوصاف لا يقابلها شيء من الثمن. (الهداية: ٣/٣٥)

شرح المجلة:

إذا باع مالا بوصف مرغوب فيه فظهر المبيع خالياً عن ذلك الوصف كان المشتري مخيراً إن شاء فسخ البيع وإن شاء أخذه بجميع الثمن المسمى ويسمى

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1 *Imdād al-Muftīyyīn*, vol. 2, p. 690.

2 *Fatāwā Mahmūdīyyah*, vol. 16, p. 107.

بذا الخيار خيار الوصف، مثلاً: لو باع بقرة على أنها حلوب فظهرت غير حلوب يكون المشتري مخيراً وكذا لو باع فصاً ليلاً على أنه ياقوت أحمر فظهر أصفر يخير المشتري. (شرح المجلة لمحمد خالد الاتاسى، فى بيان خيار الوصف، ٢/٢٥٣)

وللاستزادة انظر: (الدر المختار مع رد المحتار: ٤/٥٨٧، سعيد. وشرح العناية على هامش فتح القدير: ٥/٥٢٨)

'Itr Hidāyah:

Khiyār-e-Wasf means that the characteristics in an item as described by a seller proved to be wrong. The buyer will have the choice of retaining it while paying the full amount or returning it.[1]

Allāh ta'ālā knows best.

Trading in honey bees and silk worms

Question

It is permissible to trade in honey bees and silk worms?

Answer

It is permissible – without any reprehensibility – to trade in honey bees and silk worms.

الدر المختار:

ويباع دود القز أى الإبريسم وبيضه أى بزره وهو بزر الفيلق الذي فيه الدود والنحل المحرز وهو دود العسل، وهذا عند محمد وبه قالت الثلاثة، وبه يفتىٰ عينى وابن ملك وخلاصة وغيرها، قوله المحرز قال فى البحر: و هو معنى ما فى الذخيرة إذا كان مجموعاً لأنه حيوان منتفع به حقيقة وشرعاً فيجوز بيعه، وإن كان لا يؤكل كالبغل والحمار. (الدر المختار مع رد المحتار: ٥/٦٨، مطلب فى بيع القرمز، سعيد)

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[1] *'Itr Hidāyah*, p. 101.

الفتاوى الهندية:

بيع النحل يجوز عند محمد وعليه الفتوىٰ، كذا فى الغياثية...وبيع دود القز وهو دود الفيلق يجوز عند محمد أيضاً وعليه الفتوىٰ كذا فى الواقعات. (الفتاوى الهندية: ٣/١١٤، الفصل الرابع فى بيع الحيوانات)

Allāh taʿālā knows best.

Compelling a seller to purchase an item

Question

The ink which we buy from a company is used to print on buckets which are manufactured by us. We said to the company that since we buy the ink from you, you must buy the buckets from us. The company agreed to do this and made a promise in this regard. But it is not buying from us. We wrote to the company stating: "If you do not buy the buckets from us, we will stop buying the ink from you."

Is it permissible for us to compel that company in this way? Is it permissible for us to stop buying ink from it solely because it does not buy our buckets?

Answer

The Sharīʿah gives immense importance to the mutual consent and agreement of both parties to a transaction. This is why it says that in the absence of mutual consent, trade and transactions are not correct and impermissible. Based on this, it is not permissible to compel anyone to buy. The Qur'ān states:

يٰأَيُّهَا الَّذِيْنَ اٰمَنُوْا لَا تَأْكُلُوْآ أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلاَّ أَنْ تَكُوْنَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ.

> O believers! Do not devour the wealth of each other among yourselves wrongfully unless it be a transaction by mutual consent.[1]

If there is a transaction – i.e. an exchange of goods – but there is no consent between the two parties, then the transaction is invalid and impermissible.[1]

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[1] Sūrah an-Nisā', 4: 29.

Therefore, you cannot compel anyone to buy your buckets. It is also not permissible to lay down this condition: If you do not buy buckets from us, we will not buy ink from you.

A Hadīth states:

> عن عمرو بن شعيب عن أبيه عن جده أن النبي صلى الله عليه وسلم نهى عن بيع وشرط. (المعجم الاوسط للطبرانى: ٣٣٥/٤، القاہرة)
>
> Rasūlullāh sallallāhu ʿalayhi wa sallam prohibited a transaction with an attached condition.

شرح المجلة:

وأما أن لا يقتضيه العقد ولا يلايمه ولا جرى العرف باشتراطه وفيه نفع لأحد العاقدين أو لغيرهما من أہل الاستحقاق، فالبيع في ہذه الصورة فاسد، قال فى النہر: وإنما فسد البيع بہذا الشرط لأنهما إذا قصدا المقابلة بين المبيع والثمن فقد خلا الشرط عن العوض وقد وجب البيع بالشرط فكان الشرط زيادة مستحقة بعقد المعاوضة خالية عن العوض فيكون ربا، وكل عقد بشرط الربا يكون فاسداً. (شرح المجلة لمحمد خالد الاتاسى، فصل فى حق البيع بشرط: ٦٠/٢. وكذا فى الہدايہ: ٥٩/٣)

Yes, if the company made a promise and could not fulfil it for some reason or the other, there will be no sin on it. As for the issue of buying ink, you can buy it from whomever you want. There is no restriction on you in this regard.

Allāh taʿālā knows best.

When the price is unknown

Question

A certain practice is prevalent nowadays. A person owns a piece of land but does not have the money to construct anything on it. A

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[1] *Maʿārif al-Qur'ān*, vol. 2, p. 380.

governmental department enters into an agreement with such people. For example, the department will construct a building consisting of several shops. One of the shops will be given to the landowner as a price, while the remaining shops will be under the control of the department. Is a transaction of this nature permissible?

Answer

This transaction is incorrect and impermissible because the price – i.e. the shop – is non existent at the moment. It contains the element of jahālat-e-fāhishah (a major ignorance) which could lead to a dispute. After the shop has been constructed, will the owner of the land like it or not, will it be constructed properly or not? Various other questions could lead to a dispute. Although the nature of the building could be ascertained from the plans which are drawn by the architect, it is difficult to know all the details.

يلزم أن يكون الثمن معلوماً، أى بالإشارة إليه أو ببيان مقداره ووصفه لأن التسلم والتسليم واجب بالعقد وجهالة ما ذكر مفضية للمنازعة فيمتنع التسلم والتسليم وكل جهالة بهذه صفتها تمنع الجواز. (شرح المجلة لمحمد خالد الاتاسى، الباب الثالث، ١٥٨/٢. وكذا فى شرح المجلة لسليم رستم باز، ١٢٢/١)

وفي حاشية الطحطاوي: وكذا لا يصح البيع إذا كان الثمن مجهولاً كما إذا باع شيئاً بقيمته. (حاشية الطحطاوى على الدر المختار: ١٣/٣، كوئته)

وفي فتاوى الشامي: وخرج أيضاً ما لو كان الثمن مجهولاً كالبيع بقيمته أو برأس ماله أو بما اشتراه أو بمثل ما اشتراه فلان، فإن علم المشتري بالقدر فى المجلس جازو منه أيضاً ما لو باعه بمثل ما يبيع الناس إلا أن يكون شيئاً لا يتفاوت، نهر. قوله ووصف ثمن لأنه إذا كان مجهول الوصف تتحقق المنازعة فالمشتري يريد دفع الأدون والبائع يطلب الأرفع فلا يحصل مقصود شرعية العقد، نهر. (فتاوى الشامى: ٥٢٩/٤، سعيد)

A simple way for the permissibility of this transaction is to defer the price, and quantify it in a currency [rands, dollars, etc.]. Once the

shops are constructed, the landowner can be given a shop in exchange for the money.

Allāh taʿālā knows best.

Giving a discount when a credit amount is paid before hand

Question

A business sells garments on credit, but the period of repayment is not specified. The buyer is given a receipt which states that if he pays off the amount within one month, he will receive a certain discount; and if he pays it off within two months, he will receive a certain discount. Is a transaction of this nature permissible?

Answer

1. It is necessary to specify the final date of the repayment together with the price of the item. For example, this is the price, and it will have to be paid off within three months.

يلزم أن تكون المدة معلومة فى البيع بالتأجيل والتقسيط، لأن جهالته تفضي إلى النزاع فالبائع يطالب في مدة قريبة، والمشتري يأباها، فيفسد البيع (بحر). (شرح المجلة لمحمد خالد الاتاسى، ٢/١٦٧)

2. The discounts which are given for the periodic payments should rather be phrased as a promise: Allāh willing, we promise to give you such and such discount if you pay within one month, and such and such discount is you pay within two months. Since the buyer's signature is not on the receipt, it will be a one-sided promise; not a contract.

A contract is defined as follows:

عقد يرفع النزاع. (الدر المختار: ٢١٦\٨، سعيد)

A contract which removes dispute.

There is no contract here because the buyer neither said anything nor did he write down anything. Rather, it is a promise from one party.

3. If it is classified as a contract, then to reconcile a deferred payment with an immediate payment and to reduce the amount owned; then *Sharh al-Kāfī* of al-Istījābī states that this is permissible.

وذكر في شرح الكافي للاسبيجابي: جواز ہذا الصلح مطلقاً على قياس قول أبي يوسف لأنہ إحسان من المديون فى القضاء بالتعجيل وإحسان من صاحب الدين فى الاقتضاء بحط بعض حقہ. (تكملة رد المحتار، لمحمد علاء الدين الشامى، ٢٥٣/٨، فصل فى دعوى الدين)

According to *Sharh al-Kāfī*, this contract is permissible according to Imām Abū Yūsuf rahimahullāh. The debtor did an act of kindness by paying quickly, and the creditor did an act of kindness by pardoning a portion of what was due to him.

It is stated in *Sharh ʿUqūd Rasm al-Muftī* that in matters related to credit transactions, the fatwā ought to be issued on the view of Imām Abū Yūsuf rahimahullāh. This is because he had experience in matters related to transactions due to his holding the post of Chief Justice.

Furthermore, the Hadīth mentions the virtue of leniency and kindness when paying a debt and collecting a debt:

> قال: وخياركم من إذا كان عليہ الدين أحسن القضاء وإن كان لہ أجمل فى الطلب. (مشكوٰة شريف: ٤٣٧/٢، باب الامر بالمعروف)
>
> The best of you is the one who pays promptly when he has a debt, and is lenient when asking for the payment of a debt.

Allāh taʿālā knows best.

The issue of lay-byes

Question

A popular transaction nowadays is what is known as a lay-bye. This is how it works: A buyer wants to buy an item whose price is R500 (for example), but he does not have that amount at present. He pays R100 and the balance R400 is paid in instalments, or he pays the R400 whenever he has the money and then receives the item. During this period, the item will remain under the control of the seller. Is such a transaction permissible?

Answer

In a transaction which involves repayment in instalments (bayʿ bi at-tasqīṯ), it is not permissible to withhold the item until the amount is received. This is because bayʿ bi at-tasqīṯ is a credit transaction, and the seller has the right to withhold the item until the full payment is received only in a cash transaction. The seller does not have this right in a credit transaction.

شرح المجلة:

البيع مع تأجيل الثمن وتقسيطه صحيح. أى والتأجيل لازم، فليس للبائع حبس المبيع حتى يقبضه ولا المطالبة به قبل حلول الأجل. وفيه (البحر) عن المحيط: وإذا رضي البائع بالتأجيل فقد أسقط حقه في حبس المبيع فلو حل الأجل قبل قبضه فللمشتري قبضه قبل نقد الثمن. (شرح المجلة لمحمد خالد الاتاسى، ٢/١٦٦)

الفتاوى الهندية:

قال أصحابنا للبائع حق يحبس المبيع لاستيفاء الثمن إذا كان حالاً، كذا فى المحيط، وإن كان مؤجلاً فليس للبائع أن يحبس المبيع قبل حلول الأجل ولا بعده كذا فى المبسوط، ولو كان بعض الثمن حالاً وبعضه مؤجلاً فله حبسه حتى يستوفى الحال ولو بقي من الثمن شيء قليل (فى البيع المعجل) كان له حبس جميع المبيع كذا فى الذخيرة. (الفتاوى الهندية: ٣/١٥، الباب الرابع، كتاب البيوع)

One way of withholding the item in exchange for the price is for the buyer to first take possession of the item, he then leaves it with the seller as a mortgage. Most jurists are of the view that this is permissible. Imām Muhammad rahimahullāh writes:

ومن اشترى ثوباً بدرہم، فقال للبائع: أمسک ہذا الثوب حتى أعطيک الثمن فالثوب رہن. (الجامع الصغير، كتاب الرہن، ص ٤٨٨. وكذا فى الفتاوى البزازية على ہامش الہندية: ٦/٥٥)

<u>الكفاية:</u>

قال: لأن الثوب لما اشتراه وقبضہ كان ہو وسائر الأعيان المملوكة سواء في صحة الرہن. (الكفاية على ہامش فتح القدير: ٩/٩٩، رشيدية)

<u>الدر المختار:</u>

ولو كان ذلک الشيء الذي قال لہ المشتري: أمسک ہو المبيع الذي اشتراه بعينہ لو بعد قبضہ، لأنہ حينئذٍ يصلح أن يكون رہناً بثمنہ ولو قبلہ لا يكون رہناً، لأنہ محبوس بالثمن، وقال في رد المحتار: قولہ لأنہ حينئذٍ يصلح، أى لتعين ملكہ فيہ حتى لو ہلک يہلک على المشتري ولا ينفسخ العقد. (الدر المختار مع رد المحتار: ٦/٤٩٧، كتاب الرہن)

Further reading: *Jadīd Fiqhī Masā'il*, vol. 4, pp. 265-268; *Fiqhī Maqālāt*, vol. 1, pp. 88-90.

Allāh taʿālā knows best.

Physical gharar

<u>Question</u>

A person sold a goat. The buyer then says to the seller: "You had withheld the milk in the goat's udders, and I was therefore deceived." The seller admits doing such a thing. Will the judge order him to take it back? Also, what is the reality of gharar? How many types are there? What is the ruling when gharar is found in dealings and transactions?

<u>Answer</u>

In the case under question, a physical gharar took place. And in physical gharar, the item can be returned only on the basis of religious integrity and not through a juridical order. Even if the seller admits, the judge will not return it. A muftī can return it in the light of fatwā

by way of religious integrity. If the seller said verbally: “The goat produces two litres of milk,” while he was actually deceiving the buyer, then it can be returned through a juridical order as well.

رد المحتار:

والحاصل كما فى الحقائق أنه إذا اشتراها فحلبها فوجدها قليلة اللبن ليس له أن يردها عندنا. (رد المحتار: ٤٤/٥، مطلب فى مسألة المصراة، سعيد)

المبسوط:

وأما إذا اشتراها بغير شرط خيار فليس له أن يردها بسبب التحفيل عندنا. والتصرية ليست بعيب عندنا. (المبسوط للامام السرخسى: ٣٨/١٣، باب الخيار فى البيع)

تكملة فتح الملهم:

وخالفهم أبو حنيفة ومحمد فقالا: التصرية ليست بعيب عندنا حتى يجوز الرد، وإنما يجوز للمشتري أن يرجع بنقصان قيمة المبيع، ولا خيار له فى الرد. (تكملة فتح الملهم: ٣٤٠/١)

فيض البارى:

والجواب عندي أن الحديث محمول على الديانة دون القضاء لما في فتح القدير - في باب الإقالة أن الغرر، إما قولي أو فعلي، فإن كان الغرر قولياً، فالإقالة واجبة بحكم القاضي، وإن كان الثاني تجب عليه الإقالة ديانة، ولا يدخل فى القضاء كيف! وأن الخدعات أشياء مستورة، ليس إلى علمها سبيل، فلا يمكن أن تدخل تحت القضاء فالتصرية أيضاً خديعة، ويجب فيها على البايع أن يقيل المشتري ديانة وإن لم يجب قضاءً وحينئذٍ فالحديث متأت على مسائلنا أيضاً ولم أر أحداً منهم كتب أنه موافق لنا، وادعيت من عند نفسي

أن الحديث لا يخالف مسائلنا أصلاً، لأن التصرية غرر فعلي وفيه الرد ديانة على نص فتح القدير. (فيض البارى: ٢٣١/٣، كتاب البيوع)

فالحاصل: أنه لو باع المصراة ولم يرض بها المشترى يردها ويرد معها صاعاً من تمر عند الائمة الثلاثة خلافاً للاحناف والاحناف يقولون ان شاء المشترى ردها مع صاع من تمر فلو ردها يجب على البائع قبولها ديانةً وإن لم يجب قضاءً لأن هذا لا يدخل فى دائرة القضاء غالباً إذ للبائع ان يقول كانت عندي كثيرة اللبن وصارت عندك قليلة اللبن لأجل تبدل المكان أو لأجل ترك المراقبة نعم يجب عليه أن يقبلها فيما بينه وبين الله تعالى وإن شاء المشترى أخذ النقصان.

The reality of gharar

The scholars give various definitions of gharar. Some of them are as follows:

ʿAllāmah Sarakhsī rahimahullāh:

الغرر ما يكون مستور العاقبة. (المبسوط: ١٩٤/١٢، ادارة القرآن)

ʿAllāmah ʿAynī rahimahullāh:

الغرر وهو فى الأصل الخطر، والخطر هو الذي لا يدرى أيكون أم لا، وقال ابن عرفة: الغرر هو ما كان ظاهره يغر وباطنه مجهول، قال والغرور ما رأيت له ظاهراً تحبه وباطنه مكروه أو مجهول، وقال الأزهري: بيع الغرر ما يكون على غير عهدة ولا ثقة، وقال صاحب المشارق: بيع الغرر بيع المخاطرة، وهو الجهل بالثمن أو المثمن أو سلامته أو أجله. (عمدة القارى: ٤٣٥/٨، ملتان)

وقال في إكمال المعلم: فأما الغرر فما تردد بين السلامة والعطب أو ما في معنى ذلك، وذلك أنه يلحق بمعنى إضاعة المال، لأنه قد لا يحصل المبيع ويكون

بذل ماله باطلاً. (اكمال المعلم: ١٣٣/٥، باب بطلان بيع الحصاة والبيع الذى فيه الغرر)

وقال ابن العربي فى القبس: فأما الغرر فهو كل أمر خفيت علانيته وانطوى أمره. (القبس: ٧٩٢/٢)

وقال ملك العلماء: الغرر هو الخطر الذي استوى فيه طرف الوجود والعدم بمنزلة الشك. (بدائع الصنائع: ١٦٣/٥، سعيد)

'Allāmah Kāsānī rahimahullāh says that gharar refers to an uncertain condition where existence and non-existence are equal. It is on the level of a doubt.

There are many texts prohibiting gharar:

قال العلامة العيني: وقد وردت أحاديث كثيرة فى النهي عن بيع الغرر: منها: رواه مسلم في صحيحه من حديث أبي هريرة رضي الله عنه قال: نهى رسول الله صلى الله عليه وسلم عن بيع الحصاة، وعن بيع الغرر، وأخرجه الأربعة أيضاً، ومنها: حديث ابن عمر رضي الله عنه رواه البيهقى من حديث نافع عنه، قال : نهى رسول الله صلى الله عليه وسلم عن بيع الغرر. ومنها حديث ابن عباس رضي الله عنه أخرجه ابن ماجة من حديث عطاء عنه قال: نهى رسول الله صلى الله عليه وسلم عن بيع الغرر، ومنها حديث أبي سعيد أخرجه ابن ماجة أيضاً من حديث شهر بن حوشب عنه قال: نهى رسول الله صلى الله عليه وسلم عن شراء ما في بطون الأنعام حتى تضع، وعما في ضروعها إلا بكيل، وعن شراء العبد وهو آبق وعن شراء المغانم حتى تقسم وعن شراء الصدقات حتى تقبض، وعن ضربة القانص. ومنها حديث على رضي الله عنه أخرجه أبو داود وفيه: قد نهى النبي صلى الله عليه وسلم عن بيع المضطر وبيع الغرر.ومنها: حديث ابن مسعود رضي الله عنه أخرجه أحمد عنه قال: قال رسول الله صلى الله عليه وسلم: لا تشتروا السمك فى الماء فإنه غرر ومنها:

حديث عمران بن الحصين رضي الله عنه أخرجه ابن أبي عاصم في كتاب البيوع: أن النبي صلى الله عليه وسلم نهى عن بيع ما في ضروع الماشية قبل أن تحلب وعن بيع الجنين في بطون الأنعام، وعن بيع السمك فى الماء وعن المضامين والملاقيح وحبل الحبلة وعن بيع الغرر. (عمدة القارى: ٤٣٦/٨، باب بيع الغرر)

The gist and essence of the above texts is that Rasūlullāh sallallāhu ʿalayhi wa sallam prohibited transactions in which there is gharar. Before Islam, there were many transactions which were in vogue, but Rasūlullāh sallallāhu ʿalayhi wa sallam prohibited them on the basis of gharar. For example:

بيع حبل الحبله، بيع المضامين، بيع الملاقيح، بيع الملامسه، بيع المنابذه، بيع الحصاة، بيع عسب الفحل، بيع الثمر قبل بدو صلاحه، بيع السمک فى الماء الكثير، بيع الطير فى الهواء، بيع اللبن فى الضرع، بيع ضربة القانص وغيرها من البياعات التي تتضمن الغرر الفاحش المؤدي إلى النزاع المشكل بين العاقدين.

Generally, there are several reasons which cause gharar and ignorance.

1. The existence of the item is not known with certainty, e.g. a slave who has escaped.
2. The existence of the item is known but its acquisition is not certain, e.g. a bird flying in the air or a fish in water.
3. The very nature of the item is unknown.
4. The nature of the item is known but the type/category is unknown.
5. The quantity is unknown and unspecified.
6. The continued existence of the item is uncertain, e.g. selling fruit of a tree before it can flower.
7. The time-span in unknown.

Types of gharar

There are two types of gharar:

1. Gharar-e-kathīr, fāhish (excessive or outrageous gharar).
2. Gharar-e-yasīr, qalīl, haqīr (slight, little or insignificant gharar).

The rule of gharar

After reviewing the texts of the jurists and Hadīth experts, we conclude that every type of gharar is not an invalidator of a transaction. Rather, excessive gharar is prohibited and an invalidator. Slight gharar is overlooked.

Hadrat Shaykh Maulānā Muhammad Zakarīyyā rahimahullāh writes in *Aujaz al-Masālik*:

وقال الباجي: ہو ما كثر فيہ الغرر، وغلب عليہ حتى صار البيع يوصف ببيع الغرر، فہذا الذي لا خلاف فى المنع منہ، وأما يسير الغرر، فإنہ لا يؤثر في فساد عقد بيع فإنہ لا يكاد يخلو عقد منہ. (اوجز المسالک، باب بيع الغرر، ٨٨/١٣، دمشق)

ʿAllāmah ʿAynī rahimahullāh writes:

وروى الطبري عن ابن سيرين بإسناد صحيح، قال: لا أعلم ببيع الغرر بأساً، وقال ابن بطال: لعلہ لم يبلغہ النہي، وإلا فكل ما يمكن أن يوجد وأن لا يوجد لم يصح وكذلک إذا كان لا يصح غالباً، فإن كان يصح غالباً كالثمرة في أول بدو صلاحہا أو كان يسيراً تبعاً كالحمل مع الحامل جاز لقلة الغرر، ولعل ہذا ہو الذي أراد ابن سيرين. (عمدة القارى، باب بيع الغرر وحبل الحبلة: ٤٣٨/٨، ملتان)

جمہرة القواعد الفقہية:

وہذا النہى الوارد منصب على الغرر الكثير الفاحش إذ اليسير منہ معفو عنہ باتفاق العلماء، إذ ہو من قبيل ما لا يستطاع الاحتراز منہ فى المعاملات، فہناک نصوص فقہية كثيرة تطرقت إلى ہذا المفہوم. (جمہرة القواعد الفقہية: ٣٠٩/١)

زاد المعاد:

ليس كل غرر سبباً للتحريم، والغرر إذا كان يسيراً أو لا يمكن الاحتراز منه لم يكن مانعاً من صحة العقد. (زاد المعاد: ٨٢٠/٥، بيع المغيبات)

الموفقات:

أصل البيع ضروري، ومنع الغرر والجهالة مكمل، فلو اشترط نفي الغرر جملة لا نحسم باب البيع. (الموفقات: ٧/٢، كتاب المقاصد، المسألة الثالثة، دار الفكر)

وقال الإمام النووي في شرح مسلم: أجمع المسلمون على جواز أشياء فيها غرر حقير. (شرح مسلم: ٢/٢، كتاب البيوع)

تكملة فتح الملهم:

فأما الغرر بمعنى جهالة المبيع فربما يحتمل إذا كان يسيراً دعت الحاجة إليه، ولم يكن مفضياً إلى المنازعة فى العرف، قال العبد الضعيف عفا الله عنه: ويخرج على هذا كثير من المسائل في عصرنا، فقد جرت العادة في بعض الفنادق الكبيرة أنهم يضعون أنواعاً من الأطعمة في قدور كبيرة، ويخيرون المشتري في أكل ما شاء بقدر ما شاء، ويأخذون ثمناً واحداً معيناً من كل أحد، فالقياس أن لا يجوز البيع لجهالة الأطعمة المبيعة وقدرها، ولكنه يجوز لأن الجهالة يسيرة غير مفضية إلى النزاع، وقد جرى بها العرف والتعامل. (تكملة فتح الملهم: ٣٢٠/١. وكذا فى جمهرة القواعد الفقهية:٣٢٠/١)

اكمال المعلم:

ولما رأيناهم أجمعوا على جواز المسائل التي عددناها، قلنا: ليس ذلك إلا لأن الغرر فيها نزر يسير غير مقصود، وتدعو الضرورة إلى العفو عنه. (اكمال

المعلم شرح صحيح مسلم للقاضى عياض، باب بطلان بيع الحصاة والبيع الذى فيہ غرر، ١٣٤/٥، دار الوفاء)

Jadīd Fiqhī Masā'il:

The circle of gharar is quite extensive. This is why the jurists specified different levels for it. Excessive gharar prohibits the permissibility of a transaction while a slight gharar does not.[1]

Further reading: *Mālī Muʿāmalāt Parr Gharar Ke Atharāt* of Dr. Maulānā Iʿjāz Ahmad Samdānī, Idārah al-Maʿārif, Karachi.

Allāh taʿālā knows best.

The sale of weighed items without reweighing them

Question

If the second buyer purchases 10kgs of rice from the first buyer, then according to the jurists, it is necessary to reweigh the item. The first buyer will weigh it for himself, and when he sells it to the second buyer, the latter will reweigh it. If the first buyer weighs it for himself in the presence of the second buyer after having sold it to him, it will not be necessary to reweigh it. Nowadays we buy weighed items from shops and supermarkets. They are in sealed boxes or packets. Neither does the first buyer (shopkeeper) weigh them nor does the second buyer (customer at the shop) weigh them. Does this mean that millions of peoples' transactions will be impermissible? Kindly explain.

Answer

If a specific item is known to have a specific weight and its weight is known, there is no need to reweigh it. It is permissible to resell it without reweighing it. This is because every container [box, packet, etc.] is a tool for a defined weight.

Furthermore, items of a specified weight fall under the category of closely counted items, and there is little possibility of cheating in the weight. This is because in our times, items are weighed and measured by machines in factories. There is no room for more and less. Also, people nowadays are hugely reliant on machines. Therefore, the transaction is not in any doubt.

The basis of this entire ruling is the following Hadīth of Ibn Mājah:

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[1] *Jadīd Fiqhī Masā'il*, vol. 4, p. 209.

عن جابر رضي الله عنه قال نهى رسول الله صلى الله عليه وسلم عن بيع الطعام حتى يجري فيه الصاعان صاع البائع وصاع المشتري. (رواه ابن ماجة: ١٦١/١)

> Rasūlullāh sallallāhu ʽalayhi wa sallam prohibited the sale of food until it is weighed twice; once by the seller and once by the buyer.

The author of *al-Hidāyah* explains the reasoning behind the prohibition in this Hadīth, viz. the possibility of excesses. It will be committed by the seller, and it is unlawful to interfere in the property of someone else.

قال فى الهداية: ولأنه يحتمل أن يزيد على المشروط وذلك للبائع والتصرف في مال الغير حرام فيجب التحرز عنه. (الهداية: ٧٥/٣، باب المرابحة والتولية)

The following narration is quoted by Bayhaqī rahimahullāh:

فيكون للبائع الزيادة وعليه النقصان. (السنن الكبرى: ٣١٦/٥، دار المعرفة، بيروت)

However, this possibility is rare in our times. Generally, there is no fluctuation from the weight which is stated on the packaging. Some commentators say that the need to reweigh and re-measure is so that the item does not remain unknown.

قال فى الكفاية: وإنما شرط ذلك لأن المبيع يتناول ما يحويه الكيل أو الوزن وهو مجهول فربما يزيد وينقص فما لم يكل لنفسه أو لم يزن لا يمتاز المبيع عن غيره فكان المبيع مجهولاً. (الكفاية شرح الهداية على هامش فتح القدير: ١٤١/٦، رشيدية)

وفي شرح العناية: ومعناه أن المانع من التصرف هو احتمال الزيادة... وأنه معلول باحتمال الزيادة على المشروط وذلك بما يتصور إذا بيع مكايلة فلم يتناول ما عداه... وفيه ذكر جريان الصاعين وليس ذلك إلا لتعيين المقدار وتعيين المقدار إنمايحتاج إليه عند توهم زيادة أو نقصان فكان فى النص ما

يدل على أنه معلول بذلك. (شرح العناية على هامش فتح القدير: ٥١٦/٦، ٥١٧، دار الفكر)

وفي فتح القدير: قال عامتهم كفاه ذلك حتى يحل للمشترى التصرف فيه قبل كيله ووزنه إذا قبضه، وعند البعض لا بد من الكيل أو الوزن مرتين احتجاجاً بظاهر الحديث، والصحيح قول العامة لأن الغرض من الكيل والوزن صيرورة المبيع معلوماً وقد حصل بذلك الكيل واتصل به القبض، ومحمل ظاهر الحديث إذا وجد عقدان بشرط الكيل بأن يشترى المسلم إليه من رجل كراً لأجل رب السلم وأمر رب السلم بقبضه اقتضاء عن سلمه فإن في ذلك يشترط صاعان: صاع للمسلم إليه، وصاع لرب السلم فيكيله للمسلم إليه، ثم يكيله لنفسه. (فتح القدير: ٥١٧/٦، دار الفكر)

<u>اعلاء السنن:</u>

نقول إن البائع إذا كال الطعام بعد البيع بحضرة المشتري يكون ذلك الصاع هو صاع المشتري... فعندنا قوله "حتى يجري فيه الصاعان" أعم من أن يكون جريان الصاعين حقيقة أو حكماً ويرشد إليه قوله: "فيكون لصاحبه الزيادة وعليه النقصان" لأنه يدل أن العلة فى النهي إنما هو امتياز حق البائع عن حق المشتري. (اعلاء السنن: ٢٣٩/١٤)

We conclude from the above juridical texts that the fundamental reason behind the prohibition in the <u>H</u>adīth is ignorance about the sale-item and its adulteration with the rights of others. Whereas nowadays, the exact weight of the item is written on the item. This serves as an absolute weight for subsequent buyers and removes all doubt as regards the sale-item. In this way, the objective and reasoning of the <u>H</u>adīth is fulfilled.

<u>H</u>a<u>d</u>rat Maulānā Muftī Walī <u>H</u>asan <u>S</u>ā<u>h</u>ib writes:

As for those who practise on the obvious meaning of the <u>H</u>adīth, the answer to them is that the essence of a transaction is that the sale-item must not be unknown. However, when the seller weighs it in the

presence of the buyer, the ignorance concerning the item is removed and the seller comes to know its weight. The actual import of the Hadīth will be realized in bayʿ as-salam.[1]

حاشية تبيين الحقائق:

قال الاتقاني: وصورة المسئلة فى الجامع الصغير محمد عن يعقوب عن أبي حنيفة قال إذا اشتريت شيئاً مما يكال أو يوزن أو يعد فاشتريت ما يكال كيلاً أو ما يوزن وزناً أو ما يعد عداً فلا تبعه حتى تكيله أو تزنه أو تعده فإن بعته قبل أن تفعل وقد قبضته فالبيع فاسد... وإن كاله أو وزنه بعد العقد بحضرة المشتري مرة فيه اختلاف المشايخ قال عامتهم كفاه ذلك حتى يحل للمشترى التصرف فيه قبل الكيل والوزن ثانياً... والصحيح قول العامة لأن الغرض من الكيل أو الوزن إعلام المبيع وإفرازه وذلك يحصل بالواحد فلا حاجة إلى الإعادة قالوا: الحديث ورد فيما إذا وجد عقدان بشرط الكيل. (حاشية الشيخ الشلبى على تبيين الحقائق: ٨١/٤، امدادية ملتان)

تقريرات الرافعى على ہامش الفتاوى الشامى:

ثم لما كانت الدراہم والدنانير لا زيادة فيها عن مقدارہا المعلوم بين الناس جوزوا التصرف فيها بعد القبض قبل الوزن لعدم احتمال الزيادة في وزنها المانع من التصرف في غيرہا. (تقريرات الرافعى على ہامش الفتاوى الشامى: ١٥٨/٥، سعيد)

We learn from the above that if the weight is known and established among people in a society, then there is room for conducting a transaction without reweighing the item. For example, in those times, the weight of dīnārs and dirhams was known to people. The precondition of reweighing them was therefore not laid down. In our times, the packaging of the various companies is well-known. This is why the precondition of reweighing an item has been left out.

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[1] *Dars al-Hidāyah*, p. 252.

Objection: Some jurists state that reweighing forms a part of the completion of taking possession of an item. This is why it has to be done.

والدليل على أن الكيل والوزن ...من تمام القبض أن القدر فى المكيل والموزون معقود عليہ... ولا يعرف القدر فيهما إلا بالكيل أو الوزن. (اعلاء السنن: ٢٤٣/١٤)

Answer: The weight which is written on the item enables the buyer to learn its weight. This ensures completion of taking possession. This is the view of the majority of jurists.

However, it is mentioned in *Takmilah Fath al-Mulhim* that Hadrat Anwar Shāh Kashmīrī Sāhib rahimahullāh considers the order in the narration of Ibn Mājah to be one of desirability (istihbāb and not obligation).[1]

Hadrat Shāh Sāhib rahimahullāh is of the view that reweighing an item is not necessary – neither is one transaction nor in two. He writes in *Fayd al-Bārī*:

لو اعتبرنا مثل ہذه الاحتمالات لزم أن لا يجوز التصرف فيما إذا كان بحضرتہ أيضاً فإن الاحتمال لا ينقطع... فالذي تبين أن المشتري إن اعتمد على كيل البائع جاز لہ أكلہ بدون إعادة الكيل سواء كان بحضرتہ أو بغيبتہ... إذا كان ہناک ثالث يشاہد الكيل (يعنى كيل البائع الأول) فاشتراه كفاه عن إعادة الكيل عندي لأن المطلوب كون المبيع معلوماً وقد حصل نعم إن كالہ يستحب لہ ذلک فلا حاجة إلى تعدد الكيل فى الصفقتين أيضاً. (فيض البارى: ٢٢٠/٣)

If the opinion of Hadrat Shāh Sāhib rahimahullāh is taken, then there seems to be no doubt about the validity of the transactions of our times. After all, everyone trusts the weight as specified by the various companies [e.g. rice mills, sugar mills, flour mills]. Furthermore, according to Hadrat Shāh Sāhib rahimahullāh, it is not even necessary for the buyer to be present at the time of weighing the item. In fact, he

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[1] *Takmilah Fath al-Mulhim*, vol. 1, p. 359.

says that even when there are several transactions, and the sale-item is known, then there is no need to weigh it. This view is supported by the following text of ʿAllāmah Akmal ad-Dīn, the author of *al-ʿInāyah*:

قال: وإذا نظرنا إلى التعليل وهو قوله ولأنه يحتمل أن يزيد على المشروط وذلك للبائع يقتضي أن يكتفى بالكيل الواحد في أول المسألة أيضاً كما ذكرنا ولو ثبت أن وجوب الكيلين عزيمة والاكتفاء بالكيل الواحد رخصة أو قياس أو استحسان لكان ذلك مدفعاً جارياً على القوانين لكن لم أظفر بذلك. (شرح العناية: ٥١٨/٦)

This was also the view of Hadrat ʿAṭā' ibn Rabāh rahimahullāh – that there is absolutely no need to reweigh the item:

وقال عطاء يجوز بيعه بالكيل الأول مطلقاً. (اعلاء السنن: ٢٣٨/١٤، ادارة القرآن)

All these explanations revolve around the point when we accept that transactions of today are concluded with the precondition of weighing. Whereas this is contrary to what we observe.

وفسر إمام الحرمين البيع مكايلة بأن يقول بعتك هذه الصبرة كل صاع بدرهم... ومنها أن يقول بعتكها على أنها عشرة آصع ومنها أن يقول بعتك عشرة آصع. (اعلاء السنن: ٢٤٥/١٤)

But nowadays, transactions are not concluded with the precondition of quantity. Rather, the weight which is written on the sale-item takes on the duty of a description [of the item].

"كالذرع فى الثوب." وقال فى الهداية: وبخلاف ما إذا باع مزارعة لأن الزيادة له إذ الزرع وصف فى الثوب. (الهداية: ٧٥/٣)

قال فى العناية: ولو اشترى المعدود عداً فهو كالمذروع فيما يروى عن أبي يوسف ومحمد وهو رواية عن أبي حنيفة لأنه ليس بمال الربا، ولهذا جاز بيع

الواحد بالاثنين فكان كالمذروع، وحكمه أنه لا يحتاج إلى إعادة الذرع إذا باع مذارعة. (شرح العناية: ٦/٥١٨)

The point which I am making is that – in our times – based on necessity and a universal occurrence (*'ūmūm balwā*), the fatwā could be issued on this narration.

Ahsan al-Fatāwā:

The objective of the buyer and seller is a specific box or package. The weight which is written on it is not pre-conditioned. Therefore, transactions without reweighing it are permissible.

Maulānā Fatah Muhammad Sāhib Lucknowī rahimahullāh writes in *'Itr Hidāyah*:

There is no need to reweigh a container or box whose weight is specified and known. This is because every container [box, packet, etc.] is a tool for a defined weight. For example, a person buys 1 000kg of wheat for R20 000.00, and each box contains 2kg. It will be enough to merely count 500 boxes, and it will be understood that the price of each box is R40.

In our times, most transactions are concluded by an exchange [of money and goods]. There is no sign of an offer and an acceptance.

(غير الدراهم والدنانير) لجواز التصرف فيهما بعد القبض قبل الوزن كبيع التعاطى فإنه لا يحتاج فى الموزونات إلى وزن المشتري ثانياً لأنه صار بيعاً بالقبض بعد الوزن، قنية. وقال ابن عابدين: عبارة البحر وہذا كله في غير بيع التعاطى... وظاہر قوله وہذا كله أنه لا يتقيد بالموزونات بل التعاطى فى المكيلات والمعدودات كذلك. (الدر المختار مع رد المحتار: ٥/١٥٠)

Ahsan al-Fatāwā:

Question One: A certain amount of milk is always bought from a certain milkman, but it is not weighed in our presence. He weighs it at his dairy, brings it to us, and empties it into our milk-can. We trust that he weighed it correctly...

Question Two: Nowadays, people in the city have adopted this procedure of buying goods. They phone the shopkeeper and give him a list of what they want, and what their quantities should be. He must

weigh the items and keep them aside. The buyer then sends someone to pick up the items from the shopkeeper...

Answer: Both transactions are classified as بيع بالتعاطي bayʿ bi at-taʿāṯī (an exchange transaction). Therefore, it is not necessary for the buyer to reweigh the items...[1]

To summarize the above discussion, we can say that it is permissible to sell weighed items without reweighing them due to the following reasons:

1. Since items are weighed and measured by machines [electronic scales, etc.], there is little possibility of error and ignorance.
2. Nowadays, most transactions are conducted with the precondition of weight.
3. There is room for the validity of such transactions on the basis of bayʿ bi at-taʿāṯī.
4. Hadrat Anwar Shāh Kashmīrī rahimahullāh is of the view that it is desirable [and not obligatory] to reweigh.
5. Each box or container is a tool for a defined weight.
6. Items which have a specified weight are on the level of an estimated number.

Allāh taʿālā knows best.

Reweighing an item in bay' bi at-ta'āṯī

Question

A person bought 3kgs of flour from a shop for 200 rupees. He said to the shopkeeper: "You must weigh it and send it home." He sent it to the person's house. The seller did not weigh it in the presence of the buyer nor his representative. According to the jurists, this is impermissible. However, this practice is quite common. What is the ruling of the Sharīʿah?

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[1] *Ahsan al-Fatāwā*, vol. 6, p. 498.

ومن اشترى مكيلاً مكايلة أو موزوناً موازنة فاكتاله أو اتزنه ثم باعه مكايلة أو موازنة لم يجز للمشترى منه أن يبيعه ولا أن يأكله حتى يعيد الكيل والوزن. (الهداية: ٧٥/٣)

<u>Answer</u>

In this case, it is permissible because it is classified as bayʿ bi at-taʿāṯī. There is no need to reweigh it. Ibn Humām raḫimahullāh states in *Fatḫ al-Qadīr* that jurists in general are of the view that the weighing of the seller is sufficient; it is not necessary for the buyer to reweigh it.

<u>فتح القدير:</u>

قال عامتهم كفاه ذلك حتى يحل للمشترى التصرف فيه قبل كيله ووزنه إذا قبضه ...والصحيح قول العامة لأن الغرض من الكيل والوزن صيرورة المبيع معلوماً وقد حصل بذلك الكيل واتصل به القبض. (فتح القدير: ٥١٧/٦، دار الفكر)

<u>فيض الباري:</u>

فالذي يتبين أن المشتري إن اعتمد على كيل البائع جاز له أكله بدون إعادة الكيل سواء كان بحضرته أو بغيبته. (فيض الباري: ٢٢٠/٣)

<u>شرح العناية:</u>

قال: وإذا نظرنا إلى التعليل وهو قوله ولأنه يحتمل أن يزيد على المشروط وذلك للبائع يقتضي أن يكتفى بالكيل الواحد في أول المسئلة أيضاً كما ذكرنا ولو ثبت أن وجوب الكيلين عزيمة والاكتفاء بالكيل الواحد رخصة أو قياس أو استحسان لكان ذلك مدفعاً جارياً على القوانين لكن لم أظفر بذلك. (شرح العناية على هامش فتح القدير: ٥١٨/٦، دار الفكر)

Ahsan al-Fatāwā:

Question: Nowadays, people in the city have adopted this procedure of buying goods: They phone the shopkeeper and give him a list of what they want, and what their quantities should be. He must weigh the items and keep them aside. The buyer then sends someone to pick up the items from the shopkeeper or the latter delivers them. The buyer does not see the need to reweigh the items. Is this system permissible in the Sharīʿah?

Answer: This transaction is classified as بيع بالتعاطي bayʿ bi at-taʿāṯī (an exchange transaction). Therefore, it is not necessary for the buyer to reweigh the items.[1]

Allāh taʿālā knows best.

Selling an item before taking possession of it

Question

Some businessmen import certain goods. Once they have concluded the deal with the overseas supplier, they go around to retailers and take orders for those goods. They even collect the monies from them even though they [importers] do not have the goods in their possession as yet. Sometimes, they take orders without collecting the money. Is it permissible to transact in this way?

Answer

A transaction of this nature is classified as *bayʿ qabl al-qabḏ* (selling an item before taking possession of it). The Sharīʿah does not permit it because it has the possibility of gharar, profiteering without a guarantee, deferred usury. Based on these fundamental reasons, it is necessary and obligatory to abstain from such a transaction.

Nonetheless, Muftī Rashīd Ahmad Ludyānwī notes a few ways in which this transaction could be permissible. He writes in *Ahsan al-Fatāwā*:

It is not permissible to sell an item before taking possession of it. Therefore, the profits from it are not lawful. There are two ways of correcting it:

1. Appoint someone as a representative to take possession of the item from the place where you bought it or for the transport

[1] *Ahsan al-Fatāwā*, vol. 6, p. 497.

company to take possession of it. When they take possession of it, the transaction will be permissible.

2. Do not sell the item before it reaches you. Instead, make a promise of sale. You may then sell it after it reaches you. In such a case, if either of the two parties deny the sale, it will only entail the sin of breaking a promise. Neither one can compel the sale. (Yes, if the item is destroyed, it will not be the item of the buyer which has been destroyed, but the seller's.)

If the buyer pays for the delivery of the goods, and if the seller then gives any of the goods to the transport company through the buyer's permission, it will be counted as the buyer taking possession of the goods. Even if the buyer did not specify the name of any particular transport company, after it is transferred to the transport company, the transaction will be permissible. (If the goods are destroyed, it will the buyer's goods which are destroyed.)[1]

A Hadīth states:

عن ابن عباس رضي الله عنه أن رسول الله صلى الله عليه وسلم قال: من ابتاع طعاماً فلا يبعه حتى يستوفيه قال ابن عباس رضي الله عنه وأحسب كل شيء مثله. (رواه مسلم: ٥/٢، باب بطلان بيع المبيع قبل القبض)

عن ابن عمر رضي الله عنه قال: كنا في زمان رسول الله صلى الله عليه وسلم نبتاع الطعام فيبعث علينا من يأمرنا بانتقاله من المكان الذي ابتعناه فيه إلى مكان سواه قبل أن نبيعه. (رواه مسلم: ٥/٢، باب بطلان بيع المبيع قبل القبض)

Hanafī jurists are of the view that the reason for the prohibition as stated in the above Ahādīth is *gharar-e-infisākh-e-'aqd.*[2] 'Allāmah Ibn Humām rahimahullāh (d. 861 A.H.) writes:

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[1] Ibid. vol. 6, p. 525.

[2] This means that as long as the item does not come into the hands of the first buyer, there is the possibility of the item not being able to come into his hands at all, and he is therefore unable to hand over the item to the second buyer.

ومن اشترى شيئاً مما ينقل ويحول لم يجز له بيعه حتى يقبضه، لأنه عليه السلام نهى عن بيع ما لم يقبض ولأن فيه غرر انفساخ العقد على اعتبار الهلاک... ثم علل الحديث (لأن فيه غرر انفساخ العقد) على اعتبار هلاک المبيع قبل القبض فيتبين حينئذٍ أنه باع ملک الغير بغير إذنه وذلک مفسد للعقد، وفى الصحاح أنه صلى الله عليه وسلم نهى عن بيع الغرر. (فتح القدير: ٥١٠/٦، ٥١٢، دار الفكر)

إن العلة فى النهي عن بيع المبيع قبل القبض هي أنه يستلزم ربح ما لم يضمن وإنما يضمن الإنسان ما يخاف فيه الهلاک وأما العقار فلا يخشى فيه ذلک إلا نادراً حتى لو كان العقار على شط البحر أو كان المبيع علواً لا يجوز بيعه قبل القبض. (تكملة فتح الملهم: ٣٥٣/١)

Jadīd Fiqhī Mabāhith:

The prohibition of selling an item before taking possession of it is mentioned in several Ahādīth. The mujtahid imāms say that the prohibition will apply if the cause is found. If not, it will not apply. After examining the statements of the mujtahid imāms, we learn that there are three causes for the prohibition of selling an item before taking possession of it:

1. The possibility of gharar.
2. Profiteering without a guarantee.
3. Deferred usury.[1]

Aham Fiqhī Faysalei:

Nowadays, there are many forms of transactions where an item is sold to a third party without first taking possession of it. Rasūlullāh sallallāhu ʿalayhi wa sallam prohibited selling an item without having taken possession of it. In the light of these transactions which are in vogue, the ninth seminar of the Islamic Fiqh Academy which was held in Jāmiʿah al-Hidāyah, Jaipur, agreed on the following:

[1] *Jadīd Fiqhī Mabāhith*, vol. 15, p. 141.

In principle, it is not permissible to sell an item without having taken possession of it. Nonetheless, if it is sold without taking possession of it, the transaction will be fāsid but not bāṯil (imperfect but not invalid). After possession has been taken, it will benefit ownership [i.e. ownership will be established].[1]

Na'e Masā'il Aur 'Ulamā'-e-Hind Ke Fayṣalei:

The prohibition of selling an item before having taken possession of it is based on *gharar-e-infisākh*. This means that as long as the item does not come into the hands of the first buyer, there is the possibility of the item not being able to come into his hands at all, and he is therefore unable to hand over the item to the second buyer.[2]

Fiqhī Maqālāt:

According to the Sharī'ah, when you are selling an item, it is necessary for it to have come into existence, to be in your ownership, and in your possession [or under your control]. The item coming into your possession could be in reality, legally or on the basis of accepted business norms. The issue now is that if an item is not with us, and we receive an order for it, we will not engage in any transaction with the person/business who sent us the order. Instead, we will make a promise of a transaction.[3]

Jadīd Fiqhī Masā'il:

As regards a fāsid transaction, we must bear in mind that if the fasād stemmed on the basis of the Sharī'ah and it entails a sin, then it will – under all conditions – be a sin. If it is due to the possibility of a dispute, but no physical dispute took place, then although the transaction will be fāsid by judicial decree, it will be correct and valid on the basis of religious integrity. The following text of Maulānā Anwar Shāh Kashmīrī raẖimahullāh is quite enlightening in this regard:

إن من البيوع الفاسدة ما لو أتى بها أحد جازت ديانة وإن كانت فاسدة قضاءً وذلك لأن الفساد قد يكون لحق الشرع بأن اشتمل العقد على مآثم فلا يجوز بحال وقد يكون الفساد لمخالفة التنازع ولا يكون فيه شيء آخر يوجب

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[1] *Aham Fiqhī Fayṣalei*, p. 100.

[2] *Na'e Masā'il Aur 'Ulamā'-e-Hind Ke Fayṣalei*, p. 106.

[3] *Fiqhī Maqālāt*, vol. 3, p. 76.

الإثم فذلك إن لم يقع فيه التنازع جاز عندي ديانة وإن بقي فاسداً قضاءً لارتفاع علة الفساد وهي المنازعة ويدل عليه مسائلهم في باب المضاربة والشركة فإنها ربما تكون فاسدة مع أن الربح يكون طيباً وراجع "الهداية" ونبه الحافظ ابن تيمية (٧٢٨م) في رسالته على أن من البيوع ما لا يقع فيه النزاع فتكون تلك جائزة فإذا أدخلتها فى الفقه وجدتها محظورة لأن أكثر أحكام الفقه تكون من باب القضاء والديانات فيها قليلة وإنما يصار إلى القضاء بعد النزاع فإذا لم يقع النزاع ولم يرفع الأمر إلى القاضي نزل حكم الديانة لا محالة فيبقى الجواز. (فيض البارى: ٢٥٨/٣)

The writer is of the view that the prohibition of selling an item before taking possession of it is based on the infringement of the right of the person and not on the basis infringement of the right of the Sharīʿah. Its fasād is by juridical decree and not religious integrity.[1]

Allāh taʿālā knows best.

The sale of non-edibles before taking possession of them

Question

Some traders import goods but sell them before they can reach them. Is it permissible to do this?

Answer

According to Imām Abū Hanīfah rahimahullāh, it is not permissible to sell movable items before having taken possession of them. Yes, if a promise is made with the buyer and it is sold to him after it reaches, it will be permissible. Alternatively, the importer could appoint someone in the country of origin as his representative to take possession of the goods. Once the representative takes possession of them, the importer may sell them. At the same time, the buyer will have the right to examine the goods visually.

Imām Mālik and Imām Ahmad rahimahullāh say that the sale of non-edibles before taking possession of them is permissible. If there is a general inconvenience in adhering to the ruling of Imām Abū Hanīfah

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[1] *Jadīd Fiqhī Masāʾil*, vol. 4, pp. 213-214.

rahimahullāh, there seems to be room to issue a fatwā on this second view.

Hadrat Maulānā Muhammad Yūsuf Bannūrī rahimahullāh writes:

This is how the seniors of our time solved the challenges related to the cancellation (faskh) of a marriage. The latter Hanafī jurists did the same with regard to the husband whose whereabouts are unknown. However, it will be necessary to desist from *talfīq* (falsification) and the pursuit of concessions will not be made the objective. For example, take the issue of selling an item before taking possession of it. Nowadays, all traders are involved in it. The entire issue will have to be assessed and pondered over to see if it is really the case, if present day society is forced into it, and if there is no escape from it. If this is the case, the fatwā will be issued on the Mālikī madh-hab. That is, the impermissibility of a sale before taking possession of it applies to non-edibles. The Hambalī view in this regard is the same as that of the Mālikīs. Furthermore, the Hadīth makes explicit mention of food:

نهى رسول الله صلى الله عليه وسلم عن بيع الطعام قبل أن يستوفيه. (سنن)

Imām Abū Hanīfah and Imām Shāfiʿī apply the prohibition to other items on the basis of the prohibition of edibles.[1]

Jadīd Fiqhī Masā'il:

As regards a fāsid transaction, we must bear in mind that if the fasād stemmed on the basis of the Sharīʿah and it entails a sin, then it will – under all conditions – be a sin. If it is due to the possibility of a dispute, but no physical dispute took place, then although the transaction will be fāsid by judicial decree, it will be correct and valid on the basis of religious integrity. The following text of Maulānā Anwar Shāh Kashmīrī rahimahullāh is quite enlightening in this regard:

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[1] *Bayyināt*, Rabīʿ ath-Thānī 1383 A.H./1963, under the article *Fikr Wa Nazar*, pp. 4-5, as quoted from *Ghayr Sūdī Beynkārī* of Hadrat Muftī Taqī ʿUthmānī Sāhib, p. 291.

لارتفاع علة الفساد وهي المنازعة ويدل عليه مسائلهم في باب المضاربة والشركة فإنها ربما تكون فاسدة مع أن الربح يكون طيباً وراجع "الهداية" ونبه الحافظ ابن تيمية (٧٢٨م) في رسالته على أن من البيوع ما لا يقع فيه النزاع فتكون تلك جائزة فإذا أدخلتها فى الفقه وجدتها محظورة لأن أكثر أحكام الفقه تكون من باب القضاء والديانات فيها قليلة وإنما يصار إلى القضاء بعد النزاع فإذا لم يقع النزاع ولم يرفع الأمر إلى القاضي نزل حكم الديانة لا محالة فيبقى الجواز. (فيض البارى: ٢٥٨/٣)

The writer is of the view that the prohibition of selling an item before taking possession of it is based on the infringement of the right of the person and not on the basis infringement of the right of the Sharīʿah. Its fasād is by juridical decree and not religious integrity.[1]

Allāh taʿālā knows best.

Purchasing goods which are auctioned by the government

Question

The government issues an order that the possessions of a debtor have to be seized and auctioned. The debtor is unhappy about it. Is it permissible for others to purchase those items at the auction?

Answer

Imām Abū Yūsuf and Imām Muhammad are of the view that it is permissible to sell off the goods of a debtor for the sake of fulfilment of his debts. It will therefore be permissible to buy those goods.

ولو له عقار يحبسه أى ليبيعه ويقضى الدين الذي عليه ولو بثمن قليل بزازية،... قال المصنف والشارح هناک والقاضي يحبس الحر المديون ليبيع ماله لدينه وقضى دراہم دينه من دراہمه يعني بلا أمره وكذا لو كانا دنانير وباع دنانيره بدراہم دينه وبالعكس استحساناً لا تحادہما فى الثمنية لا يبيع القاضي عرضه ولا عقاره للدين خلافاً لهما وبه أى بقولهما يبيعهما للدين يفتیٰ

[1] *Jadīd Fiqhī Masā'il*, vol. 4, pp. 213-214.

(اختيار) وصححه في تصحيح القدوري ويبيع كل ما لا يحتاجه للحال. وحاصله أنه إذا امتنع عن البيع يبيع عليه القاضي عرضه وعقاره وغيرهما وفى البزازية وفرع على صحة الحجر أنه يترك له دست من الثياب ويباع الباقي وتباع الحسنة ويشترى له الكفاية ويباع كانون الحديد ويشترى له من طين ويباع فى الصيف ما يحتاجه للشتاء وعكسه. (الدر المختار مع فتاوى الشامى: ٣٨٧/٥، فصل فى الحبس)

وفى التصحيح والترجيح: ووقع فى الاختيار ولا يبيع يعنى القاضى العروض ولا العقار لأنه حجر عليه، وهذا تجارة لا عن تراض، وقالا: يبيع، وعليه الفتوىٰ. وقال أبو يوسف ومحمد: إذا طلب غرماء المفلس الحجر عليه حجر القاضى عليه، وبيع ماله إن امتنع المديون من بيعه. وقال القاضي: (اى قاضيخان) ولا يبيع مال المديون في قول أبي حنيفة، وفي قول صاحبيه يبيع منقوله ولا يبيع عقاره عندهما. وفى رواية يبيع كما يبيع المنقول وهو الصحيح. (التصحيح والترجيح، للعلامة قاسم بن قطلوبغا، ص ٢٤٤، وكذا فى الاختيار لتعليل المختار: ١٠٦/٢، كتاب الحجر، بيروت)

Imdād al-Ahkām:

Question: Zayd did not pay his debts. The court ruled that his properties should be auctioned publicly so that his debts could be paid off from the auction. Does the court have a right to do this? When the court sells the properties of Zayd, is it permissible for ʿUmar to buy them?

Answer:

قال فى البدائع في دليل مسئلة الاستيلاء ولنا أنهم استولوا على مال مباح غير مملوك ومن استولى على مال مباح غير مملوك يملكه كمن استولى على الحطب والحشيش والصيد ودلالة أن هذا الاستيلاء على مال مباح غير مملوك ان ملك المالك يزول بعد الإحراز بدار الحرب فتزول العصمة ضرورة بزوال

الملک والدليل على زوال الملک أن الملک ہو الاختصاص بالمحل في حق التصرف أو شرع للتمکن من التصرف فی المحل وقد زال ذلک بالإحراز بالدار لأن المالک لا يمکنہ الانتفاع بہ إلا بعد الدخول (بدار الحرب) ولا يمکنہ الدخول بنفسہ لما فيہ من مخاطرة الروح وغيرہا وقد لا يوافقہ غيره ولو وافقہ فقد لا يظفر بہ ولو ظفر بہ قلما يمکنہم الاسترداد فإذا زال معنى الملک أو ما شرع لہ الملک يزول الملک ضرورة، الخ. (بدائع الصنائع: ١٢٨/٧)

قلت: وإذا أمر المالک الحربي أو نائبہ ببيع مال أحد من المسلمين بيع من يزيد لا يقدر المالک على الامتناع منہ لما فيہ من مقابلة السلطان وفيہ مخاطرة بالروح وإذا كان كذلک فقد زال ملکہ وثبت الاستيلاء عليہ لقوة السلطان.

In the present case, it seems that seizure of the goods took place. It is therefore permissible to buy them when they are auctioned.

ولا يعارضہ ما في شرح السير الكبير في غصب مسلم مال مسلم في دار الحرب وترافعہما إلى ملک تلک الديار وتمليک الغاصب حيث قال لا يحل للغاصب وإذا ظہرنا عليہم أخذه المغصوب منہ بلا قيمة فإن ہذا الحکم مخصوص بالغصب وغصب المسلم مسلماً ليس من الاستيلاء وتمکين الملک لم يکن إلا تأييداً لغصبہ بظہور يده عليہ وما كان حراماً ابتداءً لا ينقلب حلالاً بخلاف ما إذا كان الاستيلاء ابتداءً فإنہ يزيل ملک المالک عنہ. (امداد الاحکام، جلد سوم، ٣٨٢، ٣٨٣)

وللمزيد أنظر: البحرالرائق: ٨٣/٨، کتاب الحجر، وفتاوى قاضيخان: ٦٣٤/٣، کتاب الحجر، والدر المختار مع فتاوى الشامی: ١٥٠/٦. والفتاوى الہندية: ٤١٩/٣. وامداد الاحکام: ٤٠١/٤، والبدائع: ١٢٩/٧، وفتاوى محموديہ: ١٤٨/١٦. وامداد الفتاوى: ١٢٢/٣)

Allāh taʿālā knows best.

Purchasing repossessed goods

<u>Question</u>

A person took a loan from a non-Muslim bank to purchase a vehicle. The bank laid down the condition that if the loan is not paid back within a certain period, the vehicle will be repossessed. Subsequently, the bank repossessed the vehicle. Is it permissible to buy the repossessed vehicle from the bank?

<u>Answer</u>

If a non-Muslim bank made an agreement with the buyer that if he does not fulfil his instalments within a certain period, it will repossess his vehicle, then this is similar to a monetary fine (taʿzīr bi al-māl). Some scholars state that there is leeway for it. In such a case, the bank or some other institution will become the owner of the vehicle. It will be permissible to purchase the vehicle from them. H̲ad̲rat Maulānā Z̲afar Ah̲mad ʿUthmānī rah̲imahullāh considers seizure by the government to be a cause of ownership. Details in this regard were given previously. Also, the issue of monetary fines was discussed in volume four of *Fatāwā Dār al-ʿUlūm Zakarīyyā.*

If the bank imposes a fine for the non-payment of an instalment on a loan, then this is impermissible and it is classified as usury. In pre-Islamic times, if a person delayed in the payment of his debt, a fine was imposed. The Qur'ān refers to this as ribā – usury or interest. In other words:

زيادة القرض لزيادة الأجل.

In the issue under question, one form is when the bank or other institution repossesses the vehicle and returns the original amount. The statements of some scholars seem to permit this. H̲ad̲rat Muftī Rashīd Ah̲mad S̲āh̲ib rah̲imahullāh writes:

The buyer neither pays the amount nor does he cancel the transaction. In such a case, the seller will have the right to cancel it. The non-payment on the side of the buyer will be considered to be the absence of agreement/happiness, and therefore a cancellation. In this way, the cancellation of the sale by the seller will be considered to be a cancellation from both parties [the buyer and the seller].[1]

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[1] *Ah̲san al-Fatāwā*, vol. 6, p. 506.

لما تعذر استيفاء الثمن من المشتري فات رضا البائع فيستقل بفسخه. (البحر الرائق: ٣٦/٧، كوئته. وكذا فى الهداية: ١٤٧/٣)

Allāh ta'ālā knows best.

Selling a television

Question

Is it permissible to sell one's personal television? Is the money obtained from its sale halāl?

Answer

The Sharī'ah states that instruments of play and amusement, singing, musical instruments, etc. are causes of sin. The foremost use of a television is for these things. It is therefore impermissible to have a television at home. A tape-recorder or radio is used to play and listen to music, but it is not essentially for that purpose. The television is made so that pictures and images of those delivering speeches, singing, or playing sports may be seen. In such a case, images of non-mahram women are displayed and seen. Therefore, it cannot be permissible to own a television, buy one or sell one – irrespective of how common it becomes.

ولو أمسك في بيته شيئاً من المعازف والملاهي كره ويأثم وإن كان لايستعملها.[1]

Muftī Rashīd Ahmad Ludhyānwī rahimahullāh writes:

It (a television) is entirely similar to a singing girl. In fact, it is a singing girl. Therefore, as per the preferred view, it is makrūh tahrīmī to sell or repair a television or video player. Even if the less-preferred view of makrūh tanzīhī is taken, it will be makrūh tahrīmī to take up such an occupation.[2]

Other 'ulamā' say that it is permissible to sell televisions and the income derived from it is lawful, but it is not good to choose it as an occupation. The view of this second group seems to be preferred.

[1] *Islāmī Fiqh*, vol. 2, p. 388.

[2] *Ahsan al-Fatāwā*, vol. 6, p. 543.

قوله معزياً للنهر قال فيه من باب البُغاةِ وعلم من هذا أنه لا يكره بيع ما لم تقم المعصية به كبيع الجارية المغنية والكبش النطوح والحمامة الطيارة والعصير والخشب ممن يتخذ منه المعازف وأما في بيوع الخانية من أنه يكره بيع الأمرد من فاسق يعلم أنه يعصي به مشكل. (فتاوى الشامى: ٣٩١/٦، فصل فى البيع، سعيد)

H̲ad̲rat Maulānā Muftī Taqī S̲āh̲ib writes:

The screens which we see at airports are actually televisions, but they are used as monitors or CCTVs. This is a lawful use. The sale of a television is not unlawful in itself. At the same time, we cannot advise a person to start a business of selling televisions. Rasūlullāh s̲allallāhu 'alayhi wa sallam said with regard to the earnings of a cupper:

كسب الحجام خبيث.

But he did not say that it is impermissible; it is permissible according to the Sharī'ah. At the same time, he said that such an occupation is not good. Since a television is by and large used for impermissible actions, it is not good to trade in it. No Muslim should be advised to start such a business. Nonetheless, it is not correct to say that it is absolutely h̲arām and that its income is therefore h̲arām.[1]

Fiqh al-Mu'āmalāt:

The Sharī'ah ruling in this regard is that since a television is by and large used for impermissible things, and it entails countless Dīnī and worldly harms, it is not permissible to have a television in one's house, nor is its buying and selling permissible. At the same time, it can also be used in permissible ways. For example, it is used to show inanimate things such as buildings, places and parks, the movement of oceans, the rising and setting of the sun. For security purposes, for the monitoring of aeroplanes and their flight schedules, for making announcements, etc. or for countless other operational systems. If a television is sold to a person who purchases it for any of these lawful uses, the transaction will be valid and the income will undoubtedly be lawful. If a television is sold to a person regarding whom one has the overriding feeling that he will use it for unlawful purposes, it will not be permissible to sell it to him; it will be a sin because it entails aiding

[1] *Islām Aur Jadīd Ma'āshī Masā'il*, vol. 4, p. 14.

a person in committing sin. In such a case, the income is halāl but disliked.

في خلاصة الفتاوى (١٠٠/٣): وبيع الغلام الأمرد ممن يعلم أنه ممن يعصى الله يكره لأنه إعانة على معصية.

Another permissible way of selling a television is to separate its parts and components, and to sell them separately. This will be permissible.[1]

Further reading: *Jadīd Fiqhī Masā'il*, vol. 1, p. 237; *Fatāwā Mahmūdīyyah*, vol. 16, p. 129; *Taqrīr Tirmidhī*, vol. 1, p. 223.

Allāh taʿālā knows best.

Transacting with an apostate

Question

Is it permissible to transact with an apostate? What is the ruling with regard to transactions with a person who makes blasphemous statements but also portrays himself as a Muslim?

Answer

Imām Abū Yūsuf and Imām Muhammad rahimahumallāh are of the view that the transaction is valid. The fatwā is issued on their view. A person who makes blasphemous statements is also considered to be an apostate even if he portrays himself as a Muslim.

الدر المختار مع فتاوى الشامى:

وبيع المرتد فإنه موقوف عند الإمام على الإسلام ولا يوقف عندهما. (فتاوى الشامى: ١١١/٥، فصل فى الفضولى، سعيد. وكذا فى حاشية الطحطاوى على الدر المختار: ٨٧/٣، كوئته)

وفى الشامية: (اعلم أن تصرفات المرتد على أربعة أقسام)...(ويتوقف منه عند الإمام) بناء على زوام الملك (وينفذ عندهما كل ما كان مبادلة مال بمال أو عقد تبرع) إلا أنه عند أبي يوسف تصح كما تصح من الصحيح لأن الظاهر

[1] *Fiqh al-Muʿāmalāt*, vol. 1, p. 76.

عوده إلى الإسلام وعند محمد كما تصح من المريض لأنها تفضى إلى القتل ظاہراً، ط عن البحر. (الدر المختار مع فتاوى الشامى: ٢٤٩/٤، ٢٥٠، مطلب حملہ من لا يقبل اذا ارتد)

البحر الرائق:

وأما البيع الجائز الذي لا نہي فيہ فثلاثة: نافذ لازم ونافذ ليس بلازم وموقوف... وبيع المرتد عند الإمام أى موقوف. (البحر الرائق: ٦٩/٦، باب البيع الفاسد)

فتاوى الشامى:

ثم قال فى البحر والحاصل: أن من تكلم بكلمة الكفر ہازلاً أو لاعباً كفر عند الكل ولا اعتبار باعتقاده كما صرح بہ فى الخانية ومن تكلم بها مخطئاً أو مكرہاً لا يكفر عند الكل ومن تكلم بها عامداً عالماً كفر عند الكل. (فتاوى الشامى: ٢٢٤/٤، مطلب ما يشك فى انہ ردة لا يحكم بہا، سعيد)

Imdād al-Ahkām:

...Buying and selling with him is permissible, but his invitation and hospitality should not be accepted. Neither should one cajole and flatter him, unless it is done to reconcile his heart towards Islam in the hope that he will revert to it. Allāh taʿālā knows best.[1]

Ahsan al-Fatāwā:

Although Imām Abū Yūsuf and Imām Muhammad rahimahumallāh say that it is impermissible, the transaction will be valid. There is leeway to act on this view when it becomes the general norm and when there is a severe need.

قال العلامة السيد محمد أبو السعود المصرى الحنفى: (قولہ ہذا عند أبي حنيفة) اعلم أن تصرفات المرتد يتوقف فى الكسبين جميعاً وہو الصحيح

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[1] *Imdād al-Ahkām*, vol. 4, p. 393.

وقال بعض المشايخ إن تصرفه في كسب الردة نافذ في ظاهر الرواية وموقوف في رواية الحسن والأول أصح وهذا كله عند الإمام وأما عندهما فتصرفاته نافذة فى الكسبين قهستانى. (فتح المعين: ٢/٤٦٤)[1]

Allāh taʿālā knows best.

Trading in crabs

Question

In *Fatāwā Shāmī*, ʿAllāmah Shāmī rahimahullāh states in the chapter on invalid transactions that the sale of all animals except pigs is permissible. We conclude from this that Hanafīs are of the view that the sale of crabs is permissible. If this is the case, then it is against the principles of Hanafī jurisprudence because a crab is classified as an animal which is not consumed. How, then, can it become a commodity of value? How can its trade be permissible?

Answer

The permissibility and impermissibility of trading in an animal is not based on whether it is consumed or not consumed. Rather, the fundamental basis is whether benefit can be derived from it and it is also not intrinsically impure (najis al-ʿayn). If these two conditions are met, trading in it will be permissible even if it is not consumed. The reason why the jurists prohibited them in the past is that benefit could not be derived from most of these animals, e.g. insects, snakes, crabs, frogs, etc. But today, benefit can be derived from them. They are used for medical purposes and have other uses as well. Because benefit can be derived from them, the fatwā is issued on the view of Imām Muhammad rahimahullāh.

ولا يجوز بيع النحل وهذا عند أبي حنفية وأبي يوسف وقال محمد يجوز إذا كان محرزاً وهو قول الشافعي لأنه حيوان منتفع به حقيقة وشرعاً فيجوز بيعه وإن كان لا يوكل كالبغل والحمار. وفي شرح العناية: قال لأنه حيوان منتفع به حقيقة باستيفاء ما يحدث منه، وشرعاً لعدم ما يمنع عنه شرعاً، وكل ما هو

[1] *Ahsan al-Fatāwā*, vol. 8, pp. 250-252.

كذلك يجوز بيعه وكونه غير ماكول اللحم لا ينافيه كالبغل والحمار. (الهداية مع شرح العناية على هامش فتح القدير: ٤١٩/٦، باب البيع الفاسد، دار الفكر)

وفي فتح القدير: والوجه قول محمد للعادة الضرورية وقد ضمن محمد رحمه الله متلف كل من النحل ودود القز، وفى الخلاصة في بيعهما قال: الفتوىٰ على قول محمد رحمه الله. (فتح القدير: ٤٢٠/٦، دار الفكر)

وفى الدر المختار: بخلاف غيرهما من الهوام فلا يجوز اتفاقاً كحيات وضب وما فى بحر كسرطان إلاالسمک وما جاز الانتفاع بجلده أو عظمه والحاصل أن جواز البيع يدور مع حل الانتفاع مجتبىٰ واعتمده المصنف، وفى الفتاوى الشامية: قوله كحيات فى الحاوى الزاهدي: يجوز بيع الحيات إذا كان ينتفع بها للأدوية، وما جاز الانتفاع بجلده أو عظمه أى من حيوانات البحر أو غيرها... ونقل السائحاني عن الهندية: ويجوز بيع سائر الحيوانات سوى الخنزير وهو المختار، وعليه مشى فى الهداية وغيرها من باب المتفرقات. (الدر المختار مع فتاوى الشامى: ٦٨/٥، مطلب فى بيع دودة القرمز، سعيد)

وفي تقريرات الرافعى: (يجوزبيع الحيات) هي وإن كان فيها نفع إلا أنه يحرم أكلها فليحرر حموى، سندى. (التحرير المختار: ١٤١/٥، سعيد)

وللاستزادة انظر: (فتح القدير: ١١٨/٧، مسائل منثورة، دار الفكر. والفتاوى الهندية: ١١٤/٣)

Hadrat Maulānā Zafar Ahmad ʿUthmānī rahimahullāh writes:

If frogs and crabs are considered to be valuable commodities – similarly where aquatic animals are generally considered to be valuable in the markets – then selling them is permissible and their income is lawful.[1]

[1] *Imdād al-Ahkām*, vol. 3, p. 377.

Objection: There is an objection to the sale of crabs because Rasūlullāh sallallāhu ʿalayhi wa sallam prohibited their sale. What is the answer to this?

Answer: Hāfiz Ibn Hajar rahimahullāh says with reference to this Hadīth:

لم أجده. (الدراية: ٤/٤٤٢، كتاب الذبائح)

ʿAllāmah Zaylaʿī rahimahullāh says with reference to the same Hadīth:

غريب جدا. (نصب الراية: ٤\٢٠١)

This Hadīth is extremely weak and cannot be relied upon.

Allāh taʿālā knows best.

Trade and commerce via the internet

Question

If a person does business via the internet, and the amount is paid into his account, will it be accepted as taking possession of the money?

Answer

Once the amount is transferred into the seller's account and he receives an SMS notification to this effect, it will be classified as taking possession. This is because taking possession with one's hands is not a prerequisite; mere *takhliyah* (this means the seller must remove all obstacles between the buyer and the sale-item) is sufficient. The word *qabdah* (taking possession) refers to a person being able to exercise his will through the permission of another.

رد المحتار:

إن التخلية قبض حكماً لو مع القدرة عليه بلا كلفة لكن ذلك يختلف بحسب حال المبيع، ففي نحو حنطة في بيت مثلاً فدفع المفتاح إذا أمكنه الفتح بلا كلفة قبض، وفي نحو دار فالقدرة على إغلاقها قبض أى بأن تكون فى البلد فيما يظهر، وفي نحو بقر في مرعى فكونه بحيث يرى ويشار إليه قبض وفي نحو ثوب، فكونه بحيث لو مد يده تصل إليه قبض وفي نحو فرس أو طير في بيت

إمكان أخذه منه بلا معين قبض. (رد المحتار، ٥٦٢/٤، مطلب فى شروط التخلية، سعيد)

بدائع الصنائع:

وأما تفسير التسليم والقبض فالتسليم والقبض عندنا هو التخلية والتخلى وهو أن يخلى البائع بين المبيع وبين المشتري برفع الحائل بينهما على وجه يتمكن المشتري من التصرف فيه فيجعل البائع مسلماً للمبيع، والمشتري قابضاً له، وكذا تسليم الثمن من المشتري إلى البائع. (بدائع الصنائع: ٢٤٤/٥، فى حكم البيع، كتاب البيوع، سعيد)

البحر الرائق:

ولو وهب لرجل ثياباً في صندوق مقفل ودفع إليه الصندوق لم يكن قبضاً وإن كان الصندوق مفتوحاً كان قبضاً لأنه يمكنه القبض كذا فى المحيط. (البحر الرائق: ٢٨٦/٧، كتاب الهبة، كوئته. وكذا فى محيط البرهانى: ١٦٩/٧، الفصل الثانى فيما يجوز فى الهبة وما لا يجوز)

وفى الدر المختار: والتمكن من القبض كالقبض فلو وهب لرجل ثياباً في صندوق مقفل... الخ. (الدر المختار: ٦٩٠/٥، كتاب الهبة، سعيد)

Al-Maʿāyīr ash-Sharʿīyyah is the name of a book which has been compiled by twenty-seven expert jurists. The following is stated therein:

إن كيفية قبض الأشياء تختلف بحسب حالها واختلاف الأعراف فيما يكون قبضاً لها، فكما يكون القبض حسياً في حالة الأخذ باليد أو النقل أو التحويل إلى حوزة القابض أو وكيله يتحقق أيضاً اعتباراً وحكماً بالتخلية مع التمكين من التصرف، ولو لم يوجد القبض حسياً، فقبض العقار يكون بالتخلية وتمكين اليد من التصرف، فإن لم يتمكن المشتري من المبيع فلا

تعتبر التخلية قبضاً، أما المنقول فقبضه بحسب طبيعته. (المعايير الشرعيه، ص ١٢٢)

We learn from this that when an amount is transferred into a person's account in such a way that he can trade with it, then it is classified as "taking possession".

ʿItr Hidāyah:

Qabdah refers to having the power to exercise one's will over an item through the permission of another. Whether this power is obtained through the permission of the owner [of the item] or through a Sharʿī right, the qabdah will be considered permissible.[1]

Islām Aur Jadīd Maʿāshī Masā'il:

The view of Imām Abū Hanīfah rahimahullāh is that a physical qabdah is not necessary. Rather, takhliyah will suffice. Takhliyah means that the buyer must be given the power to come and take possession of the item which he bought whenever he wants. When there is no obstacle to taking possession of it, we will conclude that takhliyah took place. For example, there are several items in a box. The buyer is given the key to the box. Once the key is given to him, qabdah has taken place irrespective of whether he takes the box away or not. Imām Bukhārī rahimahullāh prefers the view of Imām Abū Hanīfah rahimahullāh and narrates the Hadīth of Hadrat Jābir radiyallāhu ʿanhu in this regard. Rasūlullāh sallallāhu ʿalayhi wa sallam bought a camel from Hadrat Jābir radiyallāhu ʿanhu. The latter then undertook a journey to Madīnah with the same camel. Hadrat Jābir radiyallāhu ʿanhu did not get off the camel, but takhliyah took place. Imām Bukhārī rahimahullāh says that we learn that qabdah took place through the takhliyah.[2]

Aham Fiqhī Faysalei:

a) If both parties [buyer and seller] are present at the same time on the internet, and the expression of acceptance takes place immediately after the offer, the transaction would be concluded. In such a case, both parties will be considered to have been present in the same place.

b) If a person made an offer of sale on the internet, and the other person was not on the internet at the time but received information of

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[1] *ʿItr Hidāyah*, p. 88.

[2] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 2, pp. 99-100.

the offer later on, then this will be classified as a sale through correspondence. Once the other party reads about the offer, it will be necessary for him to express his acceptance of it.[1]

Further reading: *Kitāb al-Fatāwā*, vol. 5, p. 201; *Na'e Masā'il Aur 'Ulamā'-e-Hind Ke Faysalei*, p. 97.

Allāh taʿālā knows best.

An RCS transaction

Question

Is an RCS transaction permissible? This is how it works:

A customer wants to buy an item on credit. The retailer tells him that the RCS company will buy it for him. The retailer gives him a form to fill, which is then faxed to the RCS company. If the application is approved, the RCS company will give a card to the buyer through which he will purchase the item. The company pays the retailer the full amount directly. In the meantime, the company does not charge the buyer any interest for three months. The customer will pay the money to the company. My question is: Can a retailer make arrangements to provide such a service?

Answer

If this is exactly how the transaction is concluded: The company buys an item from the retailer and sells it to the buyer at an added price, i.e. the company sells it to the buyer on credit at an additional price, then this transaction is permissible. However, the objection to such a transaction is that the owner or manager of the company does not take possession of the item. How, then, can it be permissible for it to sell the item before having taken possession of it?

There can be two ways in which this could be made permissible:

1. The company appoints the retailer as its representative for taking possession of the item. In other words, the owner of the company says to the retailer: "The item which I bought from you, you must take possession of it on my behalf. The same item will then be sold to the buyer at a certain price.

[1] *Aham Fiqhī Faysalei*, p. 158.

ولو اشترى من إنسان كراً بعينه ودفع غرائره وأمره بأن يكيل فيها ففعل صار قابضاً سواء كان المشتري حاضراً أو غائباً لأن المعقود عليه معين وقد ملكه المشتري بنفس العقد فصح أمر المشتري لأنه تناول عيناً هو ملكه فصح أمره وصار البائع وكيلاً له وصارت يده يد المشتري. (بدائع الصنائع: ٢٤٧/٥، فصل فى حكم البيع، سعيد)

One cannot object to this transaction by saying that a single person cannot be a seller and buyer at one and the same time. This is because the retailer is neither a buyer [of that item] nor a representative for its purchase. Rather, he is a representative for taking possession of the item.

2. The buyer is made the representative for taking possession of the item on behalf of the RCS company. The objection which could be made to this is that the first representation of the buyer is one of taking possession, and this is classified as *qabd̲ amānat* (a possession which contains the element of trust). The second taking of possession is *qabd̲ shirā'* (taking possession on the purchase of the item). This second qabd̲ is also known as *qabd̲ mu'āwad̲ah* (taking possession after paying something in return for it) and *qabd̲ d̲amān* (taking possession with the element of responsibility or accountability). The jurists say that a *qabd̲ amānat* cannot take the place of a *qabd̲ d̲amān*.

The answer to this objection is that *qabd̲ amānat* taking the place of a *qabd̲ d̲amān* is not a h̲arām action. Rather, what the jurists mean is that if the item is destroyed before the buyer can exercise his will over it, he will not have to pay any compensation. Rather, the loss will be suffered by the company. Yes, after he exercises his will over it, the *qabd̲ amānat* will automatically become a *qabd̲ d̲amān*, and the buyer will be held responsible.

When the RCS company lays down the condition that if the amount is not paid within three months, it will charge an additional percentage, then this is a usurious transaction. But a loan does not become invalid on account of an invalid condition.

وما لا يبطل بالشرط الفاسد القرض... بأن قال أقرضتك هذه المائة بشرط أن تخدمني شهراً مثلاً فإنه لا يبطل بهذا الشرط، وذلك لأن الشروط الفاسدة من باب الربا وأنه يختص بالمبادلة المالية، وهذه العقود كلها ليست بمعاوضة مالية

فلا تؤثر فيها الشروط الفاسدة، ذكره العيني. وفى البزازية: وتعليق القرض حرام والشرط لا يلزم. (البحر الرائق: ٦/١٨٧، باب المتفرقات من كتاب البيوع، كوئته)

وكذا فى تبيين الحقائق: ٤/١٣٣. والفتاوى البزازية على هامش الفتاوى الهندية: ٤/٤٢٦)

The buyer should therefore try to pay back the amount within three months. If he does not, he will be committing the sin of paying interest. If the buyer enters into such an agreement mistakenly, it will be necessary for him to save himself from interest and pay the amount within three months. In other words, the retailer must endeavour to desist from collecting the interest. If the interest transaction is between the buyer and the RCS company, the retailer must distance himself totally from collecting it.

It is also possible for the RCS company to appoint someone other than the retailer and buyer as the representative for taking possession of the item.

Allāh taʿālā knows best.

Trading in black dye

Question

A person manufactures black dye and sells it. Is this permissible, bearing in mind that it is not permissible to use it?

Answer

The principle of the Sharīʿah with regard to the permissibility or impermissibility of trading in an item is that if it is possible to use the item in a lawful way, then trading in it is permissible. If there is no way an item can be used in a lawful manner, and is used solely in sinful ways, then trading in it is unlawful. Let it be clear that it is possible to use black dye in lawful situations. For example, a person waging jihād may use it to instil terror into the unbelievers. Similarly, an old man who has a young wife is permitted to dye his hair black according to Imām Abū Yūsuf rahimahullāh. Also, if a young man's hair turns grey prematurely due to some ailment, then it will be permissible for him to use black dye to remove this defect.

Hadrat Maulānā Zafar Ahmad ʿUthmānī rahimahullāh writes:

It is permissible to manufacture and sell black dye.

لأن الحرمة ليست بقائمة بعينه وإنما الحرمة فى الاستعمال إذا استعمله خادعاً ومن شاب قبل أوان المشيب أو خضب لارهاب العدو فى الحرب يجوز له الخضاب بالسواد كما صرح به فى الهندية وغيرها.

<u>المحيط البرهانى:</u>

وأما الخضاب بالسواد: فمن فعل ذلك من الغزاة ليكون أهيب في عين العدو فهو محمود منه، اتفق عليه المشايخ، ومن فعل ذلك ليزين نفسه للنساء، وليحبب نفسه إليهن فذلك مكروه عليه عامة المشايخ، وبنحوه ورد الأثر عن عمر رضي الله عنه، وبعضهم جوزوا ذلك من غير كراهية، روي عن أبي يوسف أنه قال: كما يعجبني أن تتزين لي يعجبها أن أتزين لها، هذه الجملة من شرح "السيرالكبير". (المحيط البرهانى: ١٢٢/٦، فصل فى الزينة، رشيدية)

وفي فتاوى الشامي: قوله ويكره بالسواد، أى لغير الحرب، قال فى الذخيرة: أما الخضاب بالسواد للغزو، ليكون أهيب في عين العدو فهو محمود بالاتفاق... الخ. (فتاوى الشامى: ٤٢٢/٦، كتاب الكراهية، سعيد)

Ahsan al-Fatāwā:

It is permissible to manufacture and sell black dye because there is an instance in which it is permissible to use, viz. to instil terror in the hearts of the enemies. While it is not recommended to manufacture and sell black dye, it is not permissible to sell it to a person regarding whom you know with certainty that he will use it in an unlawful manner. As stated in *Radd al-Muhtār* and other books.[1]

Islām Aur Jadīd Maʿāshī Masā'il:

The principle with regard to trading in an item is that if it is possible to use it in a lawful manner, then selling it is permissible even if it is generally used for impermissible actions. It is the duty of the buyer to use it in a lawful manner. Hadrat ʿĀ'ishah radiyallāhu ʿanhā had

[1] *Ahsan al-Fatāwā*, vol. 8, p. 375.

bought a fabric with images on it. Rasūlullāh sallallāhu ʿalayhi wa sallam expressed his disapproval when he saw it, but he did not order her to cancel the transaction [by returning it to the seller]. We learn from this that the sale was not impermissible. Acting under the suggestion of Rasūlullāh sallallāhu ʿalayhi wa sallam, Hadrat ʿĀ'ishah radiyallāhu ʿanhā used the fabric to make a cushion and it was used as such.[1]

Allāh taʿālā knows best.

Official documentation for the completion of a transaction

Question

A man sold his property to a person one year ago. The official documentation which indicates the transfer of the property into the buyer's name has not been done as yet. This means that according to the government, the property is still legally owned by the seller. Who is its owner according to the Sharīʿah? Furthermore, who will be responsible for the expenses such as water, electricity, etc. for the past one year?

Answer

According to the Sharīʿah, the transaction is complete once the two parties [buyer and seller] agree on the offer and acceptance. Once the buyer takes possession of the item, he becomes responsible for all its income and expenditure. The one whose name is on the official documentation is not considered.

الهداية:

البيع ينعقد بالإيجاب والقبول... وإذا حصل الإيجاب والقبول لزم البيع. (الهداية: ٣/٢٠)

بدائع الصنائع:

المبيع إنما يدخل في ضمان المشتري بالقبض... لأن المبيع خرج عن ضمان البائع بقبض المشتري فتقرر عليه الثمن. (بدائع الصنائع: ٥/٢٤٠، ٢٤١، سعيد)

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[1] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 4, p. 17.

شرح المجلة:

الغرم بالغنم أى من ينال نفع شيء يتحمل ضرره. (شرح المجلة للبنانى، ١/٥٨، المادة: ٨٧)

بدائع الصنائع:

وأما تفسير التسليم والقبض هو التخلية والتخلي وهو أن يخلى البائع بين المبيع وبين المشتري برفع الحائل بينهما على وجه يتمكن المشتري من التصرف فيه فيجعل البائع مسلماً للمبيع والمشتري قابضاً له... ولهذا يدخل المبيع في ضمان المشتري بالتخلية نفسها بلا خلاف. (بدائع الصنائع: ٥/٢٤٤، سعيد)

Imdād al-Muftīyyīn:

Ownership according to the Sharī'ah is not established by the mere name of a person in the official/governmental documentation. The owner will have to make the buyer its owner and give him possession of it.[1]

Allāh taʻālā knows best.

Trading in cigarettes

Question

A man has a shop in which – in addition to other goods - he sells cigarettes. Is this permissible? Will his income be lawful? What is the ruling with regard to smoking cigarettes?

Answer

The medical fraternity concurs that cigarette-smoking is harmful to the body. This is why even the 'ulamā' of the past had stated that it is makrūh. Based on this, trading in cigarettes is also makrūh. A person should abstain from such a business. Yes, we cannot say that his income is unlawful. The 'ulamā' have presented considerable proofs

[1] *Imdād al-Muftīyyīn*, vol. 2, p. 890.

for the detestability of smoking cigarettes. Some of them are quoted below:

(1)

It entails wastage of money because it is neither classified as a food nor a drink. Furthermore, it has no benefit to the body. In fact, it is harmful to it. It entails wastage and extravagance. Allāh taʿālā says:

كُلُوْا وَاشْرَبُوْا وَلَا تُسْرِفُوْا.

> Eat and drink, but do not be wasteful.[1]
>
> وَاٰتِ ذَا الْقُرْبٰى حَقَّهُ وَالْمِسْكِيْنَ وَابْنَ السَّبِيْلِ وَلَا تُبَذِّرْ تَبْذِيْرًا. إِنَّ الْمُبَذِّرِيْنَ كَانُوْآ إِخْوَانَ الشَّيٰطِيْنِ. وَكَانَ الشَّيْطٰنُ لِرَبِّهِ كَفُوْرًا.
>
> Give to the kinsman his right, and to the needy and the traveller. Do not squander senselessly. Surely the squanderers are the brothers of the devils. Satan is ungrateful to his Sustainer.[2]

Rasūlullāh sallallāhu ʿalayhi wa sallam said:

> إن الله حرم عليكم عقوق الأمهات ومنعاً وهات ووأد البنات وكره لكم قيل وقال وكثرة السوال وإضاعة المال.
>
> (صحيح البخارى: ٨٨٤/٢، باب عقوق الوالدين)
>
> ...Allāh taʿālā made the squandering of wealth unlawful to you.

(2)

Cigarette-smoking is destructive to the body. Modern doctors concur that it is harmful to one's health. Some of its harms are:

According to the Gujarati newspaper, *Sandīsh*, a single draw on a cigarette causes one million bacteria to enter the body. These take control of the smoker's lungs, gullet and intestines. They then have

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[1] Sūrah al-Aʿrāf, 7: 31.

[2] Sūrah Banī Isrā'īl, 17: 26-27.

destructive effects on these organs. The toxic ingredients in tobacco cause cancer. In addition to cancer, several other blood diseases are born. It causes ulcers, asthma, ACDT and stomach ailments. Smoking cigarettes is – so to say – synonymous to conveying the person towards death or at least causing him to suffer chronic ailments.[1]

At-Taqaddum al-ʿIlmī quotes from the World Health Organization that at least four million people die annually as a result of smoking cigarettes.

After much research and investigation, major laboratories of the world have concluded that cigarettes contain 4 700 toxic ingredients, out of which 143 are the direct causes of cancer. Some of them are:

1. Nicotine – it causes asthma, and weakness of the brain and heart.
2. Carbon monoxide – an extremely harmful substance.
3. Arsenic – used in rat poison.
4. Cadmium - a poisonous substance which is an active component in battery acid.
5. Formaldehyde - a chemical used to preserve dead bodies.
6. DDT – a pesticide.
7. Ammonia – used to clean floors and tiles.
8. Acetone - used to remove nail polish.
9. Toluene - used in factories to clean machinery.
10. Methanol – a main component in rocket fuel.
11. Hydrogen cyanide – a poisonous substance.[2]

The harms of the above toxic substances are not confined to the cigarette smoker, but to those who are around him. Cigarette smoking is especially harmful to the foetus of a pregnant woman. In fact, cigarette smoke sometimes causes a woman to abort, the foetus to die or for it lose weight. It causes under-developed or malformed children to be born, or for the infant to be born with chronic ailments. No matter what, cigarette smoking is extremely harmful to the foetus, to suckling children and young children.[3]

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[1] *Sandīsh*, p. 7, dated 25/01/2010.

[2] *At-Taqaddum al-ʿIlmī.*

[3] *At-Taqaddum al-ʿIlmī*, issue number 68, February 2010.

These are some of the harms of cigarette smoking.[1]

A Hadīth states:

لا ضرر ولا ضرار. (رواه ابن ماجة والدارقطنى عن ابى سعيد الخدرى، وابن عباس و عبادة بن الصامت رضي الله عنه مسنداً ومالک فی المؤطا مرسلاً)

There are several explanations to this Hadīth:

ضرر ابتداءً ولا ضرر للغير انتقاماً وانتصاراً، فمن ذبح شاتک فلا تذبح شاته بل خذ منه القيمة.

Do not be the initiator in harming someone, nor harm others when exacting revenge.

لا ضرر أى لا تنقص حق الغير ولا ضرار أى لا تدخل ضرراً زائداً فى المجازات.

Do not deprive the rights of others, and do not cause more harm than what was done to you.

لا ضرر لنفسک ولا ضرار للغير.

Neither harm yourself nor harm others.

The third meaning is applicable here.

Allāh taʿālā says:

وَلَا تَقْتُلُوْا أَنْفُسَكُمْ.

Do not kill yourselves.[2]

This shows that one should also abstain from adopting the causes of one's destruction. Allāh taʿālā says in another place:

وَلَا تُلْقُوْا بِأَيْدِيْكُمْ إِلَى التَّهْلُكَةِ.

Do not throw your lives into destruction.[1]

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[1] Quoted from the monthly *al-Fārūq*, pp. 56-57, Dhū al-Hijjah 1431 A.H., article written by Maulānā Hudhayfah Wastānwī.

[2] Sūrah an-Nisā', 4: 29.

(3)

The third harm is the foul smell which is both harmful and offensive. Allāh ta'ālā says:

وَيُحَرِّمُ عَلَيْهِمُ الْخَبٰٓئِثَ.

...and forbids upon them impure things.[2]

Because its impurity is not known with certainty, it is not harām, but it is certainly makrūh.

Some scholars say that it is intoxicating or inebriating, so it is harām. However, research scholars say that there are doubts about it being an intoxicant.

الإسكار غيبوبة العقل مع حركة الأعضاء والتخدير غيبوبة العقل مع فتور الأعضاء.

Intoxication refers to the befuddlement of the brain while the limbs are able to move. Takhdīr refers to the befuddlement of the brain while the limbs become immobile and heavy. However, the doctors classify it as the cancer of the airways, stomach and lungs. It is harmful to the kidneys and liver, and is a cause of weakness of the heart and eyesight. As mentioned previously.

Hadrat Maulānā Muftī 'Abd ar-Rahīm Lājpaurī Sāhib rahimahullāh writes:

Whether it is makrūh tahrīmī or tanzīhī, it ought to be given up. One should not make a habit of it. Excessive smoking amounts to wastage and sin. The mouths of smokers have a stink – something which Rasūlullāh sallallāhu 'alayhi wa sallam abhorred.[3]

Hadrat Maulānā 'Abd al-Wahīd Makkī wrote a monograph on the prohibition of cigarettes. Towards the end, Hadrat Maulānā 'Āshiq Ilāhī Bulandshahrī Madanī – former muftī of Dār al-'Ulūm Karachi – wrote a review. A part of it is quoted here:

Now that the harms of cigarettes have become clear in our times and doctors too attest to the harms of cigarette smoking, the muftīs can

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[1] Sūrah al-Baqarah, 2: 195.

[2] Sūrah al-A'rāf, 7: 157.

[3] *Fatāwā Rahīmīyyah*, vol. 2, p. 242.

issue a fatwā of impermissibility on the basis of its harms. It is essential to save the Muslim community from its stench, its other harms and from wastage. All scholars ought to think about it. Due to the harms of cigarette smoking, there is no hesitation in issuing a fatwā of impermissibility.

I do not understand Hadrat Maulānā's fatwā of impermissibility (hurmat). I am of the view that the fatwā of reprehensibility (karāhat) is more appropriate.

To sum up, it is makrūh to trade in cigarettes, but its income is lawful.

وصح بيع غير الخمر ومفاده صحة بيع الحشيشة والأفيون. وفى الشامية: قوله وصح بيع غير الخمر أى عنده خلافاً لهما فى البيع والضمان، لكن الفتوىٰ على قوله فى البيع وعلى قولهما فى الضمان. قوله ومفاده أى مفاد التقييد بغير الخمر ولا شك في ذلك لأنهما دون الخمر وليسا فوق الأشربة المحرمة فصحة بيعها يفيد صحة بيعهما فافهم. (الدر المختار مع رد المحتار: ٤٥٤/٦، كتاب الاشربة، سعيد)

وفى الشامية: نظمه الشرنبلالي في شرحه على الوہبانية بقوله ويمنع من بيع الدخان وشربه وشاربه فى الصوم لا شك يفطر. (فتاوى الشامى: ٣٩٥/٢، باب ما يفسد الصوم وما لا يفسده، سعيد)

وفى الدرالمختار: قال شيخنا النجم: والتتن الذي حدث وكان حدوثه بدمشق في سنة خمسة عشر بعد الألف يدعى شاربه أنه لا يسكر وإن سلم له فإنه مفتر، وفى الشامية: قوله والتتن، أقول: قد اضطربت آراء العلماء فيه فبعضهم قال بكراہته، وبعضهم قال بحرمته، وبعضهم بإباحته، وأفردوه بالتاليف، وفي شرح الوہبانية للشرنبلالى: ويمنع من بيع الدخان وشربه. (الدر المختار مع رد المحتار: ٤٥٩/٦، كتاب الاشربة. وكذا فى حاشية الطحطاوى على مراقى الفلاح، ص ٦٦٥، قديمى)

Kifāyatul Muftī:

It is permissible to trade in cigarettes and tobacco. Profits accrued from their sale is lawful.[1]

Ahsan al-Fatāwā:

It is permissible to trade in cigarettes.[2]

Kitāb al-Fatāwā:

Cigarettes, bīrhī[3] and gutkā[4] are harmful to the health. The least is that they are makrūh.[5]

Allāh ta'ālā knows best.

Trading in coffins

Question

Is it permissible to trade in coffins? Can they be sold to non-Muslims?

Answer

In normal conditions, it is makrūh and inappropriate to use a coffin for a deceased Muslim. It may be used during times of need. On the other hand, since non-Muslims are not liable to follow the subsidiary rulings of Islam, there is leeway to sell coffins to them. It is permissible to trade in coffins.

وكان الشيخ الإمام أبو بكر محمد بن الفضل يقول: لا بأس به في ديارنا لرخاوة الأرض وكان يجوز استعمال رفوف الخشب واتخاذ التابوت للميت حتى قالوا لو اتخذوا تابوتاً من حديد لم أر به بأساً في هذه الديار. (المبسوط للامام السرخسى، ٦٢/٢، باب غسل الميت. وكذا فى بدائع الصنائع فى ترتيب الشرائع: ٣١٨/١، فصل فى الدفن، سعيد)

[1] *Kifāyatul Muftī*, vol. 9, p. 148.

[2] *Ahsan al-Fatāwā*, vol. 6, p. 495.

[3] A type of hand-rolled cigarette which is quite popular in India.

[4] A substance which is included in betel-leaf.

[5] *Kitāb al-Fatāwā*, vol. 5, p. 202.

وفي تبيين الحقائق: وإذا كانت الأرض رخوة فلا بأس بالشق واتخاذ التابوت من حجر أو حديد ويفرش فيه التراب. (تبيين الحقائق: ٢٤٥/١، باب الجنائز، ملتان)

وفى الدر المختار: ولا بأس باتخاذ تابوت ولو من حجر أو حديد له عند الحاجة كرخاوة الأرضي الله عنه. وفى الشامية: قال فى الحلية عن الغاية: ويكون التابوت من رأس المال إذا كانت الأرض رخوة أو ندية مع كون التابوت في غيرها مكروهاً في قول العلماء قاطبة. (قوله له) أى للميت كما فى البحر أو للرجل، ومفهومه أنه لا بأس به للمرأة مطلقاً، وبه صرح في شرح المنية فقال: وفى المحيط واستحسن مشايخنا اتخاذ التابوت للنساء يعنى ولو لم تكن الأرض رخوة فإنه أقرب إلى الستر والتحرز عن مسها عند الوضع فى القبر. (الدر المختار مع رد المحتار: ٢٣٤/٢، مطلب فى دفن الميت، سعيد)

وفى الدر المختار: والحاصل أن جواز البيع يدور مع حل الانتفاع. (الدر المختار: ٦٩/٥، سعيد)

Maulānā Khālid Sayfullāh S̲āh̲ib writes:

The permissibility or impermissibility of trading in an item is also related to whether it is of benefit or not. It seems that items whose sale and purchase are not explicitly prohibited in the Qur'ān and H̲adīth, but can be of benefit at some time or the other, then the jurists say that it is permissible to trade in them.[1]

Allāh taʿālā knows best.

Selling neck-ties

Question

Is it permissible to trade in neck-ties? What is the ruling with regard to the income from their sale?

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[1] *H̲alāl Wa H̲arām*, p. 355.

<u>Answer</u>

A neck-tie is worn by non-Muslims and flagrant sinners. It is makrūh to trade in it. One ought to abstain from selling it. Nonetheless, the income derived from its sale cannot be classified as unlawful.

وفى المحيط : لايكره بيع الزنانيرمن النصراني والقلنسوة من المجوسي لأن ذلك إذلال لهما وبيع المكعب المفضض للرجل إن ليلبسه يكره، لأنه إعانة على لبس الحرام وإن كان إسكافاً أمره إنسان أن يتخذ له خفاً على زي المجوس أوالفسقة أوخياطاً أمره أن يتخذ له ثوباً على زي الفساق يكره له أن يفعل لأنه سبب التشبه بالمجوس والفسقة- (ردالمحتار:٦/٣٩٢،فصل فى البيع،سعيد)-

Fatāwā Mahmūdīyyah:

At one time, a neck-tie used to be the hallmark of Christians, so the ruling with regard to it used to be severe. Now it is commonly worn by non-Christians as well. The ruling has therefore been lightened. We cannot say that it is polytheism or unlawful. At the same time, it is not devoid of detestability. The detestability will be severe in some places, and light in others. We will not stress its prohibition in places where its use is common.[1]

Some scholars say that a neck-tie is a religious feature of Christians, and therefore impermissible.

Observe the following from the marginalia of *Fatāwā Mahmūdīyyah*:

Although a neck-tie has become common among Muslims, it is essentially a part of Western dress. If it is not imagined to be a part of Western dress, it is still a dress of flagrant sinners and immoral people. Thus, it will be prohibited on the basis that it entails imitation of flagrant sinners. The other point is that righteous and pious people do not approve of it because it is in conflict with the dress of the 'ulamā' and devout Muslims. The third point is that Christians make reference to the crucifixion of Hadrat 'Īsā 'alayhis salām when they wear a neck-tie. And this is against the text of the Qur'ān. Together with the point of imitating the unbelievers, the fact that it is a religious feature of Christians, it will not be permissible to wear it. (Some 'ulamā' disagree

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[1] *Fatāwā Mahmūdīyyah*, vol. 19, p. 289.

on the issue of it being a reference to the crucifixion and a religious feature.)

وعن ابن عمر رضي الله تعالىٰ عنهما قال: قال رسول الله صلى الله عليه وسلم: "من تشبه بقوم" أى من شبه نفسه بالكفار مثلاً فى اللباس وغيره أو بالفساق أو الفجار أو بأهل التصوف والصلحاء الأبرار، "فهو منهم" فى الإثم والخير، قال الطيبي: هٰذا عام فى الخَلق والخُلق والشعار ولما كان الشعار أظهر فى التشبه... (مرقاة المفاتيح، كتاب اللباس، ١٥٥/٧، رشيدية). (مستفاد از حاشيه فتاوى محموديه: ٢٨٩/١٩، مبوب ومرتب)

Fatāwā Rah̲īmīyyah:

Question: Hindus celebrate a festival called Raksha Bandhan in which a sister ties a rakhi (string) around her brother's wrist. How is it to sell these rakhis during this festival?

Answer: Selling a rakhi is akin to aiding non-Muslims in their religious practices. One ought to abstain from it.[1]

Fatāwā Mah̲mūdīyyah:

According to the Sharī'ah, this feature of the non-Muslims is not one of honour. Instead, as a dress-code, it entails their humiliation. Nonetheless, it is better and more cautious to abstain from trading in it.[2]

To sum up, trading in neck-ties is not devoid of detestability. It is better to abstain from it. Even so, the income derived from their sale is not unlawful.

Allāh ta'ālā knows best.

Trading in dolls

Question

Is it permissible to trade in dolls?

[1] *Fatāwā Rah̲īmīyyah*, vol. 9, p. 206.

[2] *Fatāwā Mah̲mūdīyyah*, vol. 16, p. 138.

Answer

If a doll has a head, eyes, ears, nose, and other body parts which are clearly identifiable; then it is not permissible to buy or sell it.

الدر المختار:

اشترى ثوراً أو فرساً من خزف لأجل استئناس الصبي لا يصح ولا قيمة له. (الدر المختار: ٢٢٦/٥، سعيد)

الفتاوى الهندية:

اشترى ثوراً أو فرساً من خزف لاستئناس الصبي لا يصح ولا قيمة له ولا يضمن متلفه كذا في القنية. (الفتاوى الهندية: ٢١٥/٣)

Fatāwā Mahmūdīyyah:

There is no harm if a doll or any other toy does not have the appearance and form of a living creature. It is prohibited to make a form of a living creature and to place it in one's house. It should not be obtained even for children. One should not trade in such items.[1]

Īdāh al-Masā'il:

To make a doll out of clay, fabric, plastic, etc. and to buy or sell it while it has a head, eyes, ears, nose, etc. is not permissible.

Further reading: *Fatāwā Rahīmīyyah*, vol. 9, p. 204.

Fatāwā Mahmūdīyyah:

It is not correct to furnish the Hadīth of Hadrat 'Ā'ishah radiyallāhu 'anhā (*Mishkāt al-Masābīh*, vol. 2, p. 280) as proof for the permissibility of present day dolls. This is because there are several possibilities with regard to her Hadīth. Mullā 'Alī Qārī rahimahullāh writes:

ويحتمل أن يكون مخصوصاً من أحاديث النهي عن اتخاذ الصور، لما ذكر من المصلحة ويحتمل أن يكون قضية عائشة رضي الله تعالىٰ عنها هذه في أول

[1] *Fatāwā Mahmūdīyyah*, vol. 19, p. 503.

الهجرة قبل تحريم الصورة. (مرقاة المفاتيح: ٢٠٦/٦، امداديہ). (فتاوى محموديہ: ٥٠١/١٩،)

والمراد ههنا ما يلعب بہ الصبية من الخرق والرقع ولم يكن لها صور مشخصة كالتصاوير المحرمة. (حاشية مشكوٰة شريف: ٢٨٢/٢، باب عشرة النساء)

Īdāh al-Masā'il:

The Hadīth which makes mention of Hadrat 'Ā'ishah radiyallāhu 'anhā playing with a doll was before the prohibition of images and statues of animate objects. When the order of prohibition was revealed, Hadrat 'Ā'ishah radiyallāhu 'anhā put an end to the doll. Furthermore, her doll did not have a head – the main reason for its prohibition.[1]

وجزم ابن الجوزي بأن الرخصة لعائشة رضي الله تعالىٰ عنها في ذلك كان قبل التحريم. (عمدة القارى: ٢٦٤/١٥، باب الانبساط الى الناس، ملتان)

Allāh ta'ālā knows best.

Trading in clothing which is against the Sharī'ah

Question

What is the ruling with regard to trading in women's clothing which is against the Sharī'ah, e.g. the sides of the garment are open?

Answer

It is permissible to trade in such garments but it is better to abstain.

رد المحتار:

وفى المحيط: لا يكره بيع الزنانير من النصراني والقلنسوة من المجوسي لأن ذلك إذلال لهما وبيع المكعب المفضض للرجل إن ليلبسہ يكره، لأنہ إعانة على لبس الحرام وإن كان إسكافاً أمره إنسان أن يتخذ لہ خفاً على زي المجوس أو الفسقة أو خياطاً أمره أن يتخذ لہ ثوباً على زي الفساق يكره لہ أن يفعل

[1] *Īdāh al-Masā'il*, p. 157.

لأنه سبب التشبه بالمجوس والفسقة. (رد المحتار: ٣٩٢/٦، فصل فى البيع، سعيد)

الفتاوى الهندية:

بيع الزنار من النصارى والقلنسوة من المجوس لا يكره. (الفتاوى الهندية: ٢١٠/٣)

Fiqhī Maqālāt:

If an item or garment can be used in a permissible and impermissible way, it is permissible to trade in it. If a person buys it and uses it in an impermissible way, it will be the buyer's sin.[1]

Fatāwā Mahmūdīyyah:

It is permissible to sell such a garment…nonetheless, it is better to abstain from trading in items of this nature.[2]

Mahmūd al-Fatāwā:

Question: A Muslim tailor sews non-Shar'ī garments for Hindu customers. Is it permissible for him to take payment for this work?

Answer: It is permissible, but it is better to exercise caution.[3]

Kitāb al-Fatāwā:

There are garments which cannot be worn in the presence of non-mahrams. There are others which do not have long sleeves but can be worn in front of mahrams (e.g. one's father, son, etc.). As for the husband, a woman may wear any type of garment in his presence provided it is done in privacy. Since the businessman does not sell a garment with this purpose nor encourages it to be worn in the presence of non-mahrams without observing the rules of hijāb, and there are instances in which it is permissible for women to wear them, it will be permissible for the businessman to sell such garments. The

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1 *Fiqhī Maqālāt*, vol. 3, p. 100.

2 *Fatāwā Mahmūdīyyah*, vol. 16, p. 138.

3 *Mahmūd al-Fatāwā*, vol. 3, p. 82.

woman who buys the garment with an impermissible intention and wears it in an unlawful manner will be sinning.[1]

Allāh taʿālā knows best.

Tobacco farming

Question

Is it permissible to farm tobacco and trade in it?

Answer

It is permissible to farm tobacco and trade in it. Although tobacco is used in cigarettes, the prohibition of cigarettes is not full accepted. Also, it is non-Muslims who are the majority of smokers. Nonetheless, it is better to abstain from farming and trading in tobacco.

قلت: فيفهم منه "القاعدة: الأصل الإباحة" حكم النبات الذي شاع في زماننا المسمى بالتتن، فتنبه، وقد كرهه شيخنا العمادي في هديته إلحاقاً له بالثوم والبصل بالأولى فتدبر، وفي رد المحتار: قوله فيفهم منه حكم النبات "وهو الإباحة على المختار أو التوقف وفيه إشارة إلى عدم تسليم إسكاره وتفتيره وإضراره، وإلا لم يصح إدخاله تحت القاعدة المذكورة و لذا أمر بالتنبه. قوله وقد كرهه شيخنا العمادي في هديته، أقول: ظاهر كلام العمادي أنه مكروه تحريماً ويفسق متعاطيه. ورد عليه سيدنا عبد الغني في شرح الهدية... فقول الشارح إلحاقاً له بالثوم والبصل فيه نظر، إذ لا يناسب كلام العمادي، نعم إلحاقه بما ذكر هو الإنصاف، قال أبو السعود: فتكون الكراهة تنزيهية، والمكروه تنزيهاً يجامع الإباحة، وقال ط: ويوخذ منه كراهة التحريم فى المسجد للنهي الوارد فى الثوم والبصل وهو ملحق بهما، والظاهر كراهة تعاطيه حال القراءة لما فيه من الإخلال بتعظيم كتاب الله تعالى. (الدر المختار مع رد المحتار: ٦/٤٦٠، ٤٦١، كتاب الاشربة، سعيد)

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[1] *Kitāb al-Fatāwā*, vol. 5, p. 271.

وفى الدر المختار: وصح بيع غير الخمر ومفاده صحة بيع الحشيشة والأفيون، وفى الشامية: قوله ومفاده أى مفاد التقييد بغير الخمر، ولا شک في ذلک لأنهما دون الخمر وليسا فوق الأشربة المحرمة، فصحة بيعها يفيد صحة بيعهما فافهم. (الدر المختار مع رد المحتار: ٦/٤٥٤، كتاب الاشربة، سعيد)

Ta'līfāt Rashīdīyyah:

Trading in edible tobacco is permissible but not good.[1]

Kifāyatul Muftī:

It is permissible to trade in tobacco and its income is lawful.[2]

Kitāb al-Fatāwā:

The balanced and correct view with regard to tobacco is that it is makrūh to consume it. If it is makrūh to eat something, it will be makrūh to trade in it. While trading in tobacco is not harām, it is not devoid of reprehensibility.[3]

Fatāwā Mahmūdīyyah:

It is permissible to farm tobacco, trade in it, and use it. Yes, if it is intoxicating, it will become unlawful. When going to a masjid, the person [who smoked or consumed it] must pay particular attention to cleaning his mouth to remove the stink.[4]

Muʿallim al-Fiqh:

Question: Is it permissible to trade in tobacco which is used for consumption and smoking, if the trade is done to accrue profits and earn a livelihood?

Answer: It is permissible. ʿAllāmah Ibrāhīm ibn Husayn writes:

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[1] *Ta'līfāt Rashīdīyyah*, p. 401.

[2] *Kifāyatul Muftī*, vol. 9, p. 148.

[3] *Kitāb al-Fatāwā*, vol. 5, p.203.

[4] *Fatāwā Mahmūdīyyah*, vol. 24, p. 162.

فأما بيعها وشراؤها فيجوز لإمكان الانتفاع بها في غير الشرب بدليل تقييد الأصحاب عدم الجواز في مثلها بما لا ينتفع به. (رفع الالتباك في حكم تعاطي شجرة التنباک).

The buying and selling of tobacco is permissible because it has other benefits apart from smoking. For a thing to be impermissible, there must be no possibility of deriving benefit from it.[1]

Trading in tobacco is permissible. As for a huqqah, because there are differences of opinion about it, and the majority say it is makrūh, one should abstain from trading in tobacco which is used for smoking.[2]

Islām Aur Jadīd Maʿāshī Masā'il:

The principle with regard to trading in an item is that if it is possible to use it in a lawful manner, then selling it is permissible even if it is generally used for impermissible actions.[3]

Allāh taʿālā knows best.

Black marketing

Question

Is it permissible to trade in smuggled goods and trade on the black market? Can a person trade with people who are involved in this type of business?

Answer

Self-honour is the most important thing for every Muslim. Selling goods by breaking the law of the country could result in disgrace from the government. A person should therefore abstain from trading in this way. Although it may be permissible in itself, it is reprehensible. If it includes cheating and lying, then it will be totally unlawful.

Fatāwā Rahīmīyyah:

If the item is not impure, not prohibited to use, and not prohibited to trade in [according to the Sharīʿah], and it was bought from the owner; then trading in it is lawful in itself. However, because it is against the

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[1] *Muʿallim al-Fiqh* – Urdu translation of *Majmūʿah al-Fatāwā*, vol. 2, p. 142.

[2] Ibid. p. 140.

[3] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 4, p. 17.

law of the country, and the criminal becomes eligible for punishment – and it is not permissible to disgrace and humiliate one's self – a transaction of this nature should not be entered into.[1]

Fatāwā Mahmūdīyyah:

When a person purchases an item, he becomes its owner. He has the right to use it for himself, give it to someone, or sell it. It then becomes permissible for the one who buys it from him to use it; after all, he has become its owner. However, when a person lives under a government, he is obliged to abide by its laws. If he breaks the law, he will be committing a crime. This could put his honour and wealth into danger; and it is foolish to put one's honour and wealth into danger.[2]

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

The reality of a smuggling transaction entails bringing in goods from another country or bringing them into one's country. If it is lawful wealth, the transaction is permissible according to the Sharīʿah. However, because the government placed restrictions on it, a person has to commit many sins when acting against the law. For example, a person has to speak many lies, he has to pay bribes, and he has to put his life and honour into danger – all of which, the Sharīʿah has instructed us to safeguard and protect. Sometimes, a person has to bear physical torment and face imprisonment. This is why the law of the country has to be abided and one has to abstain from business of this nature. Nonetheless, it is permissible to trade in smuggled goods provided they are lawful items, and it is permissible to utilize them. The income from their trade is lawful.[3]

Allāh taʿālā knows best.

Trading in fireworks

Question

Is it permissible to trade in fireworks? We know for a fact that the buyer will be wasting his wealth by buying them. And wastage and reckless spending are unlawful in the Sharīʿah.

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[1] *Fatāwā Rahīmīyyah*, vol. 9, p. 222.

[2] *Fatāwā Mahmūdīyyah*, vol. 16, p. 148.

[3] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 105.

Answer

Reckless spending is unlawful and a major sin. It is necessary to abstain from it and repent. Trading in fireworks is makrūh. There is no wastage and destruction of wealth in the transaction itself. Instead, the buyer purchases them and will use them in the wrong manner. A principle of the Sharīʿah is that the rule is applied to the doer; not the causer. The trader is merely the cause. Therefore, the burden of the sin will be borne by the buyer/doer. Furthermore, the buyers are generally Hindus who are not bound to adhere to the subsidiary rulings of Islam. This is why we cannot say that a business of this nature is unlawful. Nonetheless, it is better to abstain from it.

Nowadays there are many harms in fireworks. For example:

1. Wastage of wealth in something which has no benefit. Muslims and non-Muslims are committing this sin. In Pakistan, Muslims light fireworks on the occasions of ʿĪd. In India, the Hindus do the same during their festivals, and Muslims emulate them. This is even more dangerous.
2. The air and environment become polluted by the gunpowder, and it leaves behind adverse effects.
3. Most governments do not permit fireworks. In many places, people end up breaking the law and they have to face the might of the police.
4. The sleep of people is disturbed. They cannot hear normal conversations. This is why one has to abstain from this business, even though we cannot classify its income as unlawful.
5. Animals are disturbed and distressed. They even lose their minds at times.

شرح المجلة:

قد علمت أن من شروط ضمان المتسبب أن لا يحل بين السبب والتلف فعل فاعل مختار، واشترط محمد أن يكون ذا عقل.

لو فعل أحد فعلاً يكون سبباً لتلف شيء ثم حال بين ذلك الفعل وبين التلف فعل اختياري يعني لو باشر إتلاف ذلك الشيء شخص آخر يكون ذلك الفاعل المباشر الذي هو صاحب الفعل الاختياري ضامناً.

إذا اجتمع المباشر والمتسبب أضيف الحكم إلى المباشر. (شرح المجلة للاتاسى، المادة: ٩٢٢، ٩٢٥،٤٦٧/١-٤٧٤)

شرح القواعد الفقهية:

إن الفاعل هو العلة المؤثرة، والأصل فى الأحكام أن تضاف إلى عللها المؤثرة لا إلى أسبابها الموصلة، لأن تلك أقوىٰ وأقرب، إذ المتسبب هو الذي يتخلل بين فعله والأثر المترتب عليه، من تلف أو غيره فعل فاعل مختار والمباشر هو الذي يحصل الأثر بفعله من غير أن يتخلل بينهما فعل فاعل مختار، فكان أقرب لإضافة الحكم إليه من المتسبب، قال الرملي في حاشيته على جامع الفصولين (فى الفصل ٣٣ صفحة ١٢٤): إذا اجتمع المباشر والمتسبب فالمباشر مقدم كالعلة، وعلة العلة والحكم يضاف إلى العلة لا إلى علة العلة. (شرح القواعد الفقهية: ٤٤٧، المادة، ٩٠، دمشق)

نتائج الأفكار:

من آجر بيتاً ليتخذ فيه بيت نار أو يباع فيه الخمر: إنما صحت عند أبي حنيفة لتخلل فعل فاعل مختار ولأن خطاب التحريم غير نازل في حقه. (نتائج الافكار، تكملة فتح القدير: ٦٠/١٠، دار الفكر)

فتاوى شامى:

وعلم من ہذا أنہ لا يكره بيع ما لم تقم المعصية بہ كبيع الجارية المغنية والكبش النطوح والحمامة الطيارة والعصير والخشب ممن يتخذ منہ المعازف. (فتاوى شامى: ٣٩١/٦، كتاب الحظر والاباحة، فصل فى البيع، سعيد)

Kitāb al-Fatāwā:

Muslims are the addressees for subsidiary rulings of the Sharīʿah; not non-Muslims. These items are mostly bought by non-Muslims. This is why it is permissible for Muslims to sell them; but better for them to abstain.[1]

Further reading: *Imdād al-Fatāwā*, vol. 4, p. 322.

Allāh taʿālā knows best.

Buying stolen goods

Question

A person has an overriding feeling or knows with certainty that a certain business sells stolen goods. Is it permissible to buy from such a business? What if a person has stolen goods? Can I buy them from him?

Answer

If you have an overriding feeling or you know with certainty that a person is selling stolen goods, then it is not permissible for you to buy them because it is necessary to return them to the actual owner.

حدثنا وكيع قال: حدثنا سفيان، عن مصعب بن محمد، عن رجل من أہل المدينة قال: قال النبي صلى الله عليہ وسلم: من اشترى سرقة، وہو يعلم أنہا سرقة فقد شرک في عارہا وإثمہا.

قال الشيخ محمد عوامة: مصعب بن محمد بن عبد الرحمن العبدرى، لا بأس بہ، روى عن أمامة وغيره، لكن شيخہ لم يسم، فالإسناد ضعيف بہ،

[1] *Kitāb al-Fatāwā*, vol. 5, p. 204.

والحديث عزاه فى المطالب العالية (١٣٤٦) واتحاف الخيرة (٣٦٤٢) إلى ابن عمر رضي الله عنه بمثل إسناد المصنف، وإلى أحمد بن منيع، عن قبيصة عن سفيان، عن مصعب بن ميناء، عن شيخ من الأنصار وزاد البوصيري في مختصر اتحاف السادة المهرة (٣٢٤٨) عزوه إلى الطبراني أى: مرسلاً، قلت: ذكر ذلک البيهقي في سننه الكبرى (٣٣٦/٥) ورواه الحاكم (٣٥/٢) وعنه البيهقي (٣٣٥/٥) من طريق مسلم بن خالد الزنجى، عن مصعب بن محمد المدنى، عن شرحبيل و قال المنذرى فى الترغيب (٥٤٨/٢) بعد ما عزاه للبيهقى فقط "إسناده محتمل للتحسين ويشبه أن يكون موقوفاً" وهو عند البيهقى فى الشعب (٥٥٠٠-٥١١٢) من وجه آخر عن الزنجى به. (مصنف ابن ابى شيبة مع التعليق، ٣٣٧/١١، رقم الحديث ٢٢٤٩٥، باب من كره شراء السرقة، المجلس العلمى)

Rasūlullāh ṣallallāhu ʽalayhi wa sallam said: If a person buys stolen goods while knowing that they are stolen, he has partnered the thief in the shameful act and in the sin.

If a person buys stolen goods mistakenly, he must return them to the original owner once he learns the truth about those goods. The money which he paid for them must be taken back from the thief.

قال في رد المحتار: لو ظهر غير حلال أى مسروقاً أو مغصوباً يرجع عليه المشتري. (رد المحتار: ٤٢/٥، مطلب باعه على انه كوم تراب، سعيد)

بدائع الصنائع:

ولو باع السارق المسروق من إنسان أو ملک منه بوجه من الوجوه فإن كان قائماً فلصاحبه أن يأخذه لأنه عين ملكه وللمأخوذ منه أن يرجع على السارق. (بدائع الصنائع: ٨٥/٧، فصل فى حكم السرقة، سعيد)

الدر المختار:

الحرام ينتقل، فلو دخل بأمان وأخذ مال حربي بلا رضاه وأخرجه إلينا ملكه وصح بيعه لكن لا يطيب له ولا للمشتري منه. وفي حاشية ابن عابدين: قوله ولا للمشتري منه، فيكون بشرائه منه مسيئاً لأنه ملكه بكسب خبيث وفي شرائطه تقرير للخبث ويؤمر بما كان يؤمر به البائع من رده على الحربي لأن وجوب الرد على البائع، إنما كان لمراعاة ملك الحربي ولأجل غدر الأمان، وهذا المعنى قائم في ملك المشتري كما في ملك البائع الذي أخرجه. (الدر المختار مع رد المحتار: ٩٨/٥، باب البيع الفاسد، سعيد)

الحلال والحرام فى الاسلام:

لم يحل للمسلم أن يشتري شيئاً يعلم أنه مغصوب أو مسروق أو مأخوذ من صاحبه بغير حق، قال عليه السلام من اشترى سرقة أى مسروقاً وهو يعلم أنها سرقة، فقد اشترك في ثمنها وعارها. (الحلال والحرام فى الاسلام ليوسف القرضاوى، فصل فى المعاملات، ص ٢١٦)

According to the jurists, an "overriding feeling" is classified as "conviction/certainty".

وغالب الظن عندهم ملحق باليقين وهو الذي يبتنى عليه الأحكام يعرف ذلك من تصفح كلامهم فى الأبواب. (الاشباه والنظائر: ٦٣، الفائدة الثانية. وكذا فى حاشية الطحطاوى على مراقى الفلاح ص ٦٧٥، باب ما يفسد الصوم ويوجب القضاء، قديمى)

Ta'līfāt Rashīdīyyah:

Question: Is it permissible to buy stolen goods?

Answer: If it is known with certainty that they are stolen, it will not be permissible to buy them.[1]

Kifāyatul Muftī:

The buyer knew that the seller is selling stolen goods. It was harām for him to buy them. The transaction – the sale and purchase – is impermissible. The rectitude of the buyer has been damaged because of this. The income from such a sale is also unlawful to him.[2]

Fatāwā Mahmūdīyyah:

If it is learnt through circumstantial evidence that an item has been stolen, it is not permissible to buy it. If it has already been bought, the buyer must return it. If he learns who the owner is, he must hand it over to him. He may then enter into a transaction with him if he wants, and buy it from him.[3]

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

If it is learnt through circumstantial evidence that an item has been stolen or usurped, it is not permissible to buy it because it entails aiding in a sinful act. And it is not permissible to aid in sin. Allāh taʿālā says:

وَلَا تَعَاوَنُوْا عَلَى الْإِثْمِ وَالْعُدْوَانِ.

Do not help each other in sin and transgression.[4]

Jawāhir al-Fatāwā:

If the [stolen] item is still existing, it must be returned to its original owner. If it has been destroyed or used up, its value and compensation must be paid if the person has the means. Sometimes, the original owner or his heir is not known, nor is it possible to find him. In such a case, it will be obligatory to give it in charity on behalf of the original owner and in his name.[5]

Allāh taʿālā knows best.

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[1] *Ta'līfāt Rashīdīyyah*, p. 407.

[2] *Kifāyatul Muftī*, vol. 8, p. 33.

[3] *Fatāwā Mahmūdīyyah*, vol. 16, p. 86.

[4] Sūrah al-Mā'idah, 5: 2. *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 82.

[5] *Jawāhir al-Fatāwā*, vol. 3, p. 286.

Trading in hair

Question

What is the ruling with regard to trading in hair? Is there any difference in ruling between human hair and animal hair?

Answer

It is impermissible and prohibited to take any benefit from human hair. All the body parts of a human are sanctified. This is why trading in human hair is prohibited. Buying and selling animal hair is permitted. Similarly, it is permitted to trade in plastic or fake hair. Yes, one should abstain from trading in fake hair which is worn by non-Muslims and sinners – whether male or female. In the same way, trading in the hair of pigs is prohibited because a pig is intrinsically impure. Trading in it is prohibited on the basis of its despicability.

ولا يجوز بيع شعور الإنسان ولا الانتفاع به لأن الآدمي مكرم لا مبتذل فلا يجوز أن يكون شيء من أجزائه مهاناً مبتذلاً وقد قال عليه السلام لعن الله الواصلة والمستوصلة، الحديث، وإنما يرخص فيما يتخذ من الوبر فيزيد في قرون النساء وذوائبهن. قال ولا يجوز بيع شعر الخنزير لأنه نجس العين فلا يجوز بيعه إهانة له. (الهداية: ٥٥/٣، باب البيع الفاسد. وكذا فى البحر الرائق: ٨١/٦، كوئتة. وتبيين الحقائق: ٥١/٤، ملتان)

وفي شرح العناية: ولا بأس باتخاذ القراميل وهي ما يتخذ من الوبر ليزيد في قرون النساء، أى في أصول شعرهن بالتكثير وفي ذوائبهن بالتطويل. (شرح العناية على هامش فتح القدير: ٤٢٦/٦، دار الفكر. وكذا فى فتح القدير: ٤٢٦/٦)

وفى الجامع الصغير: ولا يجوز بيع شعر الإنسان. وفى الشرح: لأن الإنسان مكرم فلا يجوز أن يكون منه شيء مبتذل وهو طاهر عندنا على الصحيح. (الجامع الصغير مع النافع الكبير، ص ٣٢٩، بيروت)

وكذا في حاشية الطحطاوي: قال والآدمى مكرم شرعاً وإن كان كافراً فايراد العقد عليه وابتذاله به وإلحاقه بالجمادات إذلال له وهو غير جائز. (حاشية

الطحطاوى على الدر المختار: ٦٦/٣، كوئته). وكذا فى رد المحتار: ٥٨/٥، مطلب ان الآدمى مكرم شرعاً ولو كافراً، سعيد)

Further reading: *Jadīd Muʿāmalāt Ke Sharʿī Ah̲kām*, vol. 1, p. 85.

Allāh taʿālā knows best.

Trading in animal/pet food

Question

Nowadays, the food of most animals is prepared in a certain way, and is then sold in the shops and supermarkets. Dead insects and worms are included in these foods. This seems to be a sale of *maytah* (carrion). Is it permissible? When it comes to feeding an animal, some jurists say that it is prohibited to offer carrion to a dog, but permissible to unleash a dog to go and feed on carrion. What is the ruling in this regard?

Answer

The principle of the Sharīʿah with regard to buying and selling an item is that if it is possible to derive benefit from it, then trading in it is permissible. If no benefit can be derived from an item, trading in it is prohibited. In this case, the dead insects and worms which are included as ingredients in the pet food are mixed with other foods; so there is leeway for trading in pet food of this nature.

لم يذكروا حكم دودة القرمز أما إذا كانت حية فينبغي جريان الخلاف الآتي في دود القز وبزره وبيضه وأما إذا كانت ميتة وهو الغالب فإنها على ما بلغنا تخنق فى الكلس أو الخل فمقتضى ما مر بطلان بيعها بالدراهم لأنها ميتة، وقد ذكر سيدي عبد الغنى النابلسي في رسالته أن بيعها باطل، وأنه لا يضمن متلفها لأنها غيرمال قلت: وفيه أنها من أعز الأموال اليوم، ويصدق عليها تعريف المال المتقدم ويحتاج إليها الناس كثيراً فى الصباغ وغيره، فينبغي جواز بيعها كبيع السرقين والعذرة المختلطة بالتراب مع أن هذه الدودة إن لم يكن لها نفس سائلة تكون ميتتها طاهرة كالذباب والبعوض وإن لم يجز أكلها وسياتي أن جواز البيع يدور مع حل الانتفاع، وأنه يجوز بيع العلق للحاجة مع

أنہ من الهوام، وبيعها باطل، وكذا بيع الحيات للتداوي، وفى القنية وبيع غير السمک من دواب البحر لو لہ ثمن كالسقنقور وجلود الخز ونحوہا يجوز وإلا فلا، وجمل الماء قيل يجوز حياً لا ميتاً والحسن أطلق الجواز. (رد المحتار: ٥/٥١، باب البيع الفاسد، سعيد)

Bahishtī Zewar:

Trading in dead animals is permissible if they fall under the category of pure animals, e.g. aquatic animals, and worms and insects which do not have flowing blood.[1]

We learn from the statements of the jurists that carrion should not be offered to dogs and cats. Rather, these animals may be let loose to roam about and eat carrion.

الفتاوى البزازية:

ولا يحمل الجيفة إلى الهرة ويحمل الهرة إلى الجيفة. (الفتاوى البزازية على ہامش الهندية: ٤/٨٢، فصل فى حكم المسجد)

نفع المفتى والسائل:

ثم إن كان لا بد من سقي الخمر فرساً لا يشربہ بل يضع الخمر بين يديہ ليشربہ، كما أن لا ينبغي أن يؤكل الميتة الكلب إلا بأن يضع الميتة بين يدى الكلب، فيأكلہ بنفسہ كما فى مطالب المؤمنين. (نفع المفتى والسائل، باب ما يتعلق بالحيوانات، ص ٤٧٢، بيروت)

المحيط البرہانى:

رجل لہ امرأة ذمية أو أب ذمي ليس لہ أن يقوده إلى البيعة، ولہ أن يقوده من البيعة إلى منزلہ، لأن الذہاب إلى البيعة معصية وإلى المنزل لا، ولا يحمل الخمر إلى الخل ولكن يحمل الخل إليها، وكذلک لا يحمل الجيفة إلى الهرة ويحمل

[1] *Bahishtī Zewar*, vol. 9, p. 103.

الهرة إلى الجيفة. (المحيط البرہانی: ٦/١٠٣، فصل فی معاملة اہل الذمة، کتاب الاستحسان، رشیدیة)

Some jurists say that impure water can be given to animals for drinking purposes:

وفی الذخیرة: ولا بأس برش الماء النجس فی الطریق ولا یسقی للبہائم وفي خزانة الفتاوىٰ: ولا بأس بأن یسقی الماء النجس للبقر والإبل والغنم. (البحر الرائق: ١/١٢٥، کوئٹہ)

When there is a need, a fatwā could be issued on the second view. The first view will be accepted as makrūh.

Allāh taʿālā knows best.

Trading in semen of animals

Question

The semen of high-pedigreed male animals is sold in the markets. People buy it and convey it in a certain way into their female animals. In this way, their animals give birth to good pedigreed offspring. Is it permissible to trade in semen in this way?

Answer

The Sharīʿah conferred the human race with nobility of lineage, has given much importance to it, and preserved it totally from adulteration. However, it did not give any regard to lineage among animals. Nonetheless, as regards the lawfulness and prohibition of animals, the mother is considered the origin. Therefore, if semen is conveyed into her womb for the sake of improving the pedigree of the offspring, then it is permissible in itself and a lawful form of deriving benefit. To a certain extent, there is also a need for it. Furthermore, this has become a societal norm and trading in it has become quite extensive. Since it has taken on the status of a commodity of value, there is room for the permissibility of this type of business.

According to the Sharīʿah, the foremost prerequisites for trade is for the commodity to have a value and be of benefit. The first thing to ascertain these two prerequisites is societal norms and practices.

شرح المجلة للاتاسی:

وشرط المعقود عليه ستة،كونه موجوداً، مالاًمتقوماً مملوكاً في نفسه وكون الملک للبائع فيما يبيعه لنفسه وكونه مقدور التسليم. (شرح المجلة للاتاسی، الباب الثانی، ٨٧/٢)

بدائع الصنائع:

وأما الذي يرجع إلى المعقود عليه فأنواع منها أن يكون موجوداً فلا ينعقد بيع المعدوم. ومنها أن يكون مالا لأن البيع مبادلة المال بالمال. ومنها أن يكون مملوكاً لأن البيع تمليک فلا ينعقد فيما ليس بمملوک. (بدائع الصنائع: ١٣٨/٥، سعيد)

الفقه الاسلامی وادلته:

وأما ما يشترط فی المعقود عليه أی المبيع فهو أربعة شروط: (١) أن يكون المبيع موجوداً (٢) أن يكون المبيع مالا متقوماً (٣) أن يكون مملوكاً في نفسه (٤) أن يكون مقدور التسليم عند العقد. (الفقه الاسلامی وادلته: ٣٥٧/٤، دار الفكر)

رد المحتار:

المراد بالمال ما يميل إليه الطبع ويمكن ادخاره لوقت الحاجة، والمالية تثبت بتمول الناس كافة أو بعضهم، والتقوم يثبت بها وبإباحة الانتفاع شرعاً. (رد المحتار: ٥٠١/٤، مطلب فی تعريف المال، سعيد)

Some scholars say that the fundamental basis for the permissibility of a transaction is the possibility of deriving benefit from the sale-item.

قال فی الدر المختار: والحاصل أن جواز البيع يدور مع حل الانتفاع. (الدر المختار: ٦٩/٥، سعيد)

الفتاوى الهندية:

والصحيح أنه يجوز بيع كل شيء ينتفع به كذا فى التتارخانية. (الفتاوى الهندية: ٣/١١٤)

الفقه الاسلامى وادلته:

والضابط عندهم: أن كل ما فيه منفعة تحل شرعاً، فإن بيعه يجوز، لأن الأعيان خلقت لمنفعة الإنسان بدليل قوله تعالىٰ: "خلق لكم ما فى الأرض جميعاً." (الفقه الاسلامى وادلته: ٤/١٨٢، دار الفكر)

Halāl Wa Harām

The permissibility or impermissibility of trading in an item is also related to whether it is of benefit or not. It seems that items whose sale and purchase are not explicitly prohibited in the Qur'ān and Hadīth, but can be of benefit at some time or the other, are permitted in trade according to the jurists.[1]

To sum up, since societal norms consider it to be a commodity, it ought to be permissible to trade in it.

Objection

One objection to this is that semen is impure. How can trading in an impurity be permissible?

Answer

We learn from the statements of the jurists that the permissibility of a transaction is not based on its purity, but on whether it is of use and benefit. If an impure thing becomes useful and people's needs are connected to it, trading in that item is permissible. For example, the droppings of animals are impure, but because they can be put to good use, their trade is permissible. Jurists of the past considered insects and worms to be filthy things, and therefore impermissible. Latter day jurists made them permissible because of the benefits which can be derived from them.

[1] *Halāl Wa Harām*, p. 355.

بخلاف غيرہما من الہوام فلا يجوز اتفاقاً كحيات وضب وما فى بحر كسرطان إلا السمک وما جاز الانتفاع بجلده أو عظمہ والحاصل أن جواز البيع يدور مع حل الانتفاع مجتبیٰ واعتمده المصنف، وفى الفتاوى الشامية: قولہ كحيات فى الحاوى الزاہدي: يجوز بيع الحيات إذا كان ينتفع بها للأدوية، وما جاز الانتفاع بجلده أو عظمہ أى من حيوانات البحر أو غيرہا... ونقل السائحاني عن الہندية: ويجوز بيع سائر الحيوانات سوى الخنزير وہو المختار، وعليہ مشى فى الہداية وغيرہا من باب المتفرقات. (الدر المختار مع فتاوى الشامى: ٦٨/٥، مطلب فى بيع دودة القزمر، سعيد)

وفي تقريرات الرافعى: يجوز بيع الحيات ہو وإن كان فيها نفع إلا أنہ يحرم أكلها فليحرر حموى، سندى. (التحرير المختار: ١٤١/٥، سعيد)

فتح القدير:

قال العلامة ابن الہمام بعد ذكر سوال يرد على المصنف: وہذا السوال ليس فى تقرير المصنف ما يرد عليہ أولاً ليحتاج إلى الجواب عنہ، فإنہ ما علل المنع إلا بعدم الانتفاع بہ، وإنما يرد على من علل بالنجاسة، ولا ينبغي أن يعلل بها بطلان البيع أصلاً، فإن بطلان البيع دائر مع حرمة الانتفاع وہي عدم المالية، فإن بيع السرقين جائز وہو نجس العين للانتفاع بہ كما ذكرنا. (فتح القدير: ٤٢٧/٦، دار الفكر). وكذا فى حاشية تبيين الحقائق للشيخ شہاب الدين احمد الشلبى: ٥١/٥. ملتان)

وفى مجمع الأنہر شرح ملتقى الأبحر: وفى التجنيس أن المختار للفتوىٰ جواز بيع لحم المذبوح من السباع وكذا الكلب والحمار لأنہ طاہر ينتفع بہ في إطعام سنورة بخلاف الخنزير المذبوح لأنہ نجس العين وفى التخصيص إشعار بعدم جواز ہوام الأرض كالحية والعقرب ودواب البحر غير السمک كالضفدع

والسرطان لأن جواز البيع يدور مع حل الانتفاع وحرمة الانتفاع بها، وقال بعضهم ان بيع الحية يجوز إذا انتفع بها للأدوية. وفى القهستانى لكن فى البحر وبيع غير السمک من دواب البحر إن كان له ثمن كالسقنقور وجلود الخز ونحوها يجوز وإلا فلا. (مجمع الانهر: ۱۵۱/۳، بيروت)

<u>المحيط البرهانى:</u>

ولا يجوز بيع هوام الأرض كالحية والعقرب والوزغ وما أشبه ذلک، لأن الانتفاع بهذه الأشياء حرام ومحليته يعتمد جواز الانتفاع بها، ولا يجوز بيع ما يكون فى البحر كالضفدع والسرطان وغيره إلا السمک، وما يجوز الانتفاع بجلده أو عظمه، والحاصل: أن جواز البيع يدور مع حل الانتفاع. (المحيط البرهانى: ۲۹۹/۷، فصل فيما يجوز بيعه وما لا يجوز، رشيدية)

وفيه أيضاً: ويجوز بيع السرقين والبعر والانتفاع بهما، وأما العذرة فلا يجوز الانتفاع بها ما لم يخلط بالتراب، ويكون التراب غالباً، وهذا لأن محلية البيع بالمالية، والمالية بالانتفاع، والناس اعتادوا الانتفاع بالبعر والسرقين من حيث الإلقاء فى الأرض لكثرة الريع وأما ما اعتادوا الانتفاع بالعذرة ما لم يكن مخلوطاً بالتراب. (المحيط البرهانى: ۷/۳۰۲، فصل فيما يجوز بيعه وما لا يجوز بيعه)

وفى الهداية: قال: ولا باس ببيع السرقين لأنه منتفع به فكان مالاً والمال محل للبيع. (الهداية: ٤٦٨/٤، كتاب الكراهية، فصل فى البيع)

وفى تبيين الحقائق: إن المسلمين تمولوا السرقين وانتفعوا به في سائر البلدان والأمصار من غير نكير. (تبيين الحقائق: ٢٦/٦، فصل فى البيع، ملتان)

فقه السنة:

واستثنیٰ الأحناف والظاهرية كل ما فيه منفعة تحل شرعاً فجوزوا بيعه، فقالوا: يجوز بيع الأرواث والأزبال النجسة التي تدعو الضرورة إلى استعمالها في البساتين، وينتفع بها وقوداً وسماداً، وكذلك يجوز بيع كل نجس ينتفع به في غير الأكل والشرب. (فقه السنة، لسيد سابق، باب شروط العاقد، ٣/٥٤)

It becomes clear from the above texts that the basis for buying and selling is the monetary value of the item. Its value is established from the ability to derive benefit from it. And the basis for the benefit of an item is how people deal with it (societal norms). The prerequisite of purity is not considered. This is why the jurists say that although dung is intrinsically impure, it is permissible for trade because of the benefit which can be derived from it. In fact, the jurists have even stated categorically that if a pure item is not of any benefit – for whatever reason – then trading in it is unlawful.

Imām Muhammad rahimahullāh states in *al-Jāmiʿ as-Saghīr*:

ولا يجوز بيع شعر الإنسان. وفي الشرح: لأن الإنسان مكرم فلا يجوز أن يكون منه شيء مبتذل وهو طاهر عندنا على الصحيح. (الجامع الصغير مع النافع الكبير، ص ٣٢٩، بيروت)

وفي المحيط: وشعر الآدمي طاهر ولا يجوز الانتفاع به. (المحيط البرهاني: ٧/٣٠٢). وكذا في البدائع: ٥/١٤٢، سعيد)

It is also unlawful to trade in blood. Despite this, it is stated in *Imdād al-Ahkām*, that if it develops the status of a valuable commodity in a society, then it will be permissible to buy and sell it.

Imdād al-Ahkām:

The above statements stipulate that if blood becomes a commodity of value at any given time, its trade will be valid.[1]

[1] *Imdād al-Ahkām*, vol. 3, p. 355.

To sum up, the semen of animals [used to impregnate females to improve the pedigree of their offspring] has become a valuable commodity in today's times so there is room for trading in it.

Allāh ta'ālā knows best.

Impregnating an animal through an injection

Question

An animal is given an injection to make it fall pregnant. The one who does this charges a fee. This means that the fee which he charges ought to be permissible because in addition to injecting the animal with the semen, he is charging for other expenses for his services.

However, there is an objection to this. A Hadīth prohibits taking a payment for *'asb al-fahl*. What is the answer to this?

Answer

We learn from the Hadīth and its commentaries that the actual prohibition applies to taking a payment for making the male animal to mount the female and impregnating it. Since it cannot be known with certainty that it will fall pregnant, there are many possibilities. For example, the semen is not fertile. If it is fertile, it could be emitted outside the animal. If it goes in, it may not go into the correct place, and the animal will not fall pregnant. Bearing these possibilities in mind, the actual pregnancy has become doubtful and unknown. And it is unlawful to accept a payment for something which is doubtful and unknown. This is what the Hadīth makes reference to. Yes, there is room to give the person a gift, as learnt from the Hadīth.

عن أنس بن مالک رضي الله عنه أن رجلاً من كلاب سأل النبي صلى الله عليه وسلم عن عسب الفحل، فنهاه فقال يارسول الله! إنما نطرق الفحل فنكرم فرخص له فى الكرامة. قال أبو عيسىٰ: وقد رخص قوم في قبول الكرامة على ذلک. (ترمذى شريف: ۲٤۰/۱، باب ما جاء فى كراهية عسب الفحل)

وفي جامع الأصول: قال: والعسب: الكراء الذي يؤخذ على ضراب الفحل، تقول عسب فحله يعسبه عسباً أى اكراه، وعسب الفحل أيضاً: ضرابه. (جامع الاصول فى احاديث الرسول: ۸۱۷۳\۵۹۲\۱۰، عسب الفحل)

وفى مسند الربيع: قال الربيع: ذكر العسب وأراد ما يؤخذ عليه من الأجرة والعسب ضراب الفحل. (مسند الربيع، باب فى المحرمات، ص ٦٣٤/٢٤٩)

This is supported by a mauqūf Hadīth:

قال أبو هريرة رضي الله عنه: أربع من السحت: ضراب الفحل... (سنن النسائى، باب عسب الفحل)

بلوغ المرام:

وعن جابر بن عبد الله رضي الله عنه قال: نهى رسول الله صلى الله عليه وسلم عن بيع فضل الماء. رواه مسلم، وزاد في رواية: وعن بيع ضراب الجمل. قال المحشي: الضراب بالكسر والتخفيف هو نزو الذكر من الحيوان على الأنثى لتلقيحها أى نهى عن كراء ضرابه وأجرة مائه... والعسب ضراب الفحل... ومورد النهى فى الحديث الأجرة التي تؤخذ على ضراب الفحل. (بلوغ المرام مع التعليق، ص ٢٢٩، كتاب البيوع)

Lughāt al-Hadīth:

The word *ʿasb* refers to a male animal mounting a female, and making a payment for this service. *Nahā ʿan ʿasb al-fahl* – Rasūlullāh sallallāhu ʿalayhi wa sallam prohibited taking a payment for causing a male to mount a female.[1]

We learn from the above texts that most commentators explain the words *ʿasb al-fahl* as *dirāb al-fahl*, i.e. causing a male animal to mount a female.

قال ابن بطال في شرح صحيح البخارى: وذهب الكوفيون والشافعى وأبو ثور إلى أنه لا يجوز عسب الفحل، واحتجوا بحديث ابن عمر رضي الله عنه، قالوا: هو شيء مجهول لا ندري أينتفع به أم لا؟ وقد لا ينزل الفحل،... ومعنى نهيه عليه السلام عن عسب الفحل هو أن يكريه إلى العلوق، لأن ذلك مجهول

[1] *Lughāt al-Hadīth*, vol. 3, p. 104.

لا يدرى متى يعلق، ولا يجوز إجارة المجهول، كما لا يجوز بيعه. (شرح صحيح البخارى لابن بطال، كتاب الاجارات، باب عسب الفحل، ٤١٢/٦)

عون المعبود:

نهى عنه للغرر لأن الفحل قد يضرب وقد لا يضرب وقد لا يلقح الأنثى وبه ذهب الأكثرون. (عون المعبود: ٢١٣/٩، باب فى عسب الفحل)

الدر المختار:

لا تصح الإجارة لعسب التيس و هو نزوه على الإناث لأنه عمل لا يقدر عليه وهو الإحبال. (الدر المختار: ٥٥/٦، كتاب الاجارة، سعيد)

Further reading: *Jadīd Muʿāmalāt Ke Sharʿī Ah̠kām*, vol. 1, pp. 265-271.

Allāh taʿālā knows best.

Trading in impure oil

Question

A person has olive oil in which a rat fell. This rendered the oil impure. Is it permissible for him to sell the oil?

Answer

According to Imām Abū H̠anīfah rah̠imahullāh, benefit could be derived from impure oil, so it is permissible to buy and sell it.

الهداية:

الفارة لو ماتت فى السمن... وإن كان مائعاً لم يؤكل وينتفع به من غير جهة الأكل مثل الاستصباح. (الهداية: ٤٥/١)

البحر الرائق:

ويجوز بيع الدهن النجس لأنه ينتفع به للاستصباح فهو كالسرقين. (البحر الرائق: كتاب البيوع، باب المتفرقات، ١٧٢/٦، كوئته)

وكذا فى شرح فتح القدير: ١١٨/٧، مسائل منثورة، دار الفكر. والموسوعة الفقهية الكويتية، باب بيع النجاسات ١٠٢/٤٠، الكويت)

وفى المبسوط للإمام السرخسي: أنہ ليس من ضرورة حرمة التناول حرمة البيع فإن الدہن النجس لا يحل تناولہ ويجوز بيعہ وكذلک بيع السرقين جائز وإن كان تناولہ حراماً والسرقين محرم العين ومع ذلک كان بيعہ جائزاً. (المبسوط للامام السرخسى، كتاب الاشربة، ٢٧/٢٤)

<u>فقہ السنة:</u>

واستثنیٰ الأحناف والظاہرية كل ما فيہ منفعة تحل شرعاً فجوزوا بيعہ، فقالوا: يجوز بيع الأرواث والأزبال النجسة التي تدعو الضرورة إلى استعمالها فى البساتين، وينتفع بها وقوداً وسماداً، وكذلک يجوز بيع كل نجس ينتفع بہ في غير الأكل والشرب كالزيت النجس يستصبح بہ ويطلى بہ. (فقہ السنة، لسيد سابق، باب شروط العاقد، ٥٤/٣)

<u>البناية:</u>

وممن أجاز الاستصباح مما يقع فيہ الفارة على وابن عباس وابن عمر ث رضي الله عنهم، قال القرطبی: اختلف في جواز بيع كل محرم نجس فيہ منفعة... وأجازه الكوفيون. (البناية: ٥٧٩/٨)

<u>الأبواب والتراجم:</u>

ليس كلما حرم تناولہ حرم بيعہ... نعم المذاب للاستصباح ليس بحرام. (الابواب والتراجم للشيخ زكريا، ١٦٤)

بداية المجتهد:

ومن ہذا الباب اختلافہم في بيع الزيت النجس... فقال مالک لا يجوز بيع الزيت النجس وبہ قال الشافعی... وقد قيل إن فی المذہب رواية أخرى تمنع الاستصباح بہ وہو ألزم للأصلی الله عليه وسلم... وفي مذہب مالک جواز الاستصباح بہ. (بداية المجتهد: ٤/٤٨٨)

فتاوى الشامی:

وينتفع بہ للاستصباح لأن الانتفاع بہ علة جواز البيع... إلا دہن ودک ميتة لأنہ عين نجاسة. (فتاوى الشامی: ٥/٢٢٩، سعيد)

Further reading: *Jadīd Fiqhī Masā'il*, vol. 1, p. 211.

Allāh taʿālā knows best.

Trading in shoes made of pig-skin

Question

We have a retail shoe business. We travel to Europe and other countries to buy our goods. Pig-skin is used in the manufacture of shoes. For example, it is used for the lining of the shoe. We ask the manufacturer to replace the lining with some other leather. They generally agree to our request. A trader ordered a consignment of shoes and asked the manufacturer to replace the lining with a different leather, and then send them over to him. We paid the money owed to him through a bank. When we received the goods and inspected the shoes, we realized that they were still lined with pig-skin. It is not possible for us to return the goods. We have already paid for them. We also paid the import duties, taxes, etc. What should we do with these shoes? Is there any way we can recoup the money which we paid?

Answer

The transaction of buying shoes made of pig-skin was not valid. It is an invalid transaction because a pig, with all its parts, is intrinsically impure. It is necessary and obligatory to return the shoes. Since it is not possible for you to do this, and you have already paid the money, there is one way of retrieving your due. This is what we came across

from the statements of the jurists. You must appoint a non-Muslim as your representative to sell the goods. You may collect your due from him, and give the remaining money in charity without the intention of reward. You will dispense with the unlawful goods in this way.

Fatāwā Bayyināt:

Question: Leather shoes and other leather goods come to our country from China, Spain and other countries. Pig-skin is used in their manufacture. Some shoes are made of faux-leather but they are lined with pig-skin. Other shoes are made entirely with pig-skin. Is it h̲arām to wear these shoes? Is it h̲arām to sell them? If a trader bought millions worth of pig-skin shoes mistakenly, what should he do?

Answer: There is no doubt about a pig being intrinsically impure. The jurists state that it is unlawful to use any part of a pig, and to trade in it. The same rule will apply to items which contain pig skin or other pig parts. A transaction which involves a pig or any part of it is invalid. The money obtained from its sale is unlawful for the seller. In fact, the money does not even go into his ownership. Those who bought such goods by mistake must return them to the shopkeeper. The latter must then return them to the company from which he bought them. In this way, they will return the goods to those non-Muslims and take back the money which they paid.[1]

قال الإمام السرخسي: وإذا كان في تركة الذمي خمر وخنزير وغر ماؤه مسلمون وليس له وصي فإن القاضي يوكل ببيع ذلك رجلاً من أهل الذمة فيبيعه ويقضي به دين الميت لأن من يأمره القاضي يكون نائباً عن الميت... والميت كافر فيجوز بيع الذمي خمره على سبيل النيابة عنه والغرماء إنما يقبضون الثمن بدينهم لا أن يكون بيع قيم القاضي واقعاً لهم. (المبسوط: ١٣١/١٥، باب قسمة الدار للميت وعليه دين او وصية، بيروت)

وفى العناية شرح الهداية: وإذا أمر المسلم نصرانياً ببيع خمر أو شرائها ففعل جاز عند أبي حنيفة، وقالا: لا يجوز على المسلم... وقولهما الموكل لا يليه فلا يوليه غيره منقوض... بالقاضي إذا أمر ذمياً ببيع خمر أو خنزير خلفه ذمي آخر

[1] *Fatāwā Bayyināt*, vol. 4, pp. 470-471.

وهو لا يلي التصرف بنفسه وبالذمي إذا أوصى لمسلم وقد تركهما فإن الوصي يوكل ذمياً بالبيع والقسمة وهو لا يلي ذلك بنفسه. (العناية شرح الهداية على هامش فتح القدير: ٤٣٩/٦، باب البيع الفاسد، دار الفكر)

Allāh taʿālā knows best.

Selling a third of the buyer's share in an invalid transaction

Question

A man bought a few plots of land from his brother twenty-three years ago. The seller made a condition that if he does not construct anything on the plots within ten years, he will take them back after the expiry of ten years. The transaction was completed and the buyer took possession of the plots. The buyer obtained the permission of the seller to exercise his right over the purchased plots. Now that twenty-three years have passed, the government wants to buy those plots and pay for them. Who will receive the money? The heirs of the seller say that they should receive the money because the first transaction was invalidated. Was the first transaction valid or not?

Answer

The first transaction was invalid because of the invalid condition which had been laid down. It was necessary to cancel the transaction, but both parties [the buyer and seller] did not cancel it. The buyer took possession of the item with the permission of the seller. And the seller also took possession of the sale amount. The buyer had therefore become the owner of the item. Now that the government is buying it after twenty-three years and wants to pay for it, the money will go to the buyer. After all, he was the owner of the sale-item. The heirs of the seller will not receive the money.

ʿAllāmah Ibn Nujaym Misrī, ʿAllāmah Shāmī and ʿAllāmah Sayyid Ahmad Tahtāwī rahimahumullāh have made it clear that in an invalid transaction, when the buyer sells the sale-item, he will receive the money for it.

قوله قبض المشترى المبيع فى البيع الفاسد بأمر البائع وكل عوضيه مال ملك المبيع بقيمته... لأن ركن البيع صدر من أهله مضافاً إلى محله فوجب القول بانعقاده ولا خفاء فى الأهلية والمحلية وركنه المبادلة المال بالمال... فنفس البيع

مشروع وبه تنال نعمة الملک إنما المحظور ما يجوره كما فى البيع وقت النداء... وفى قوله ملک المبيع رد على من قال: إنه إنما ملک التصرف دون العين وہم العراقيون وما ذكره قول أہل بلخ وہو المنصوص عليه في كلام محمد وہو الصحيح المختار، فإنه قال: إن المشتري خصم لمن يدعيه لأنه يملک رقبته كذا في جامع الفصولين... ولو باعه كان الثمن له ولو بيعت دار إلى جنبها فالشفعة للمشتري ولو أعتقه البائع لم يعتق ولو سرقه البائع من المشترى بعد قبضه قطع كما فى الجوہرة، فهذه كلها ثمرات الملک. (البحر الرائق: ٩١/٦، ٩٢، فصل فى البيع الفاسد، كوئته)

وفى الهداية: وإذا قبض المشترى المبيع فى البيع الفاسد بأمر البائع وفى العقد عوضان كل واحد منهما مال ملک المبيع ولزمته قيمته... ولكل واحد من المتعاقدين فسخه رفعاً للفساد... فإن باعه المشتري نفذ بيعه لأنه ملكه فملک التصرف فيه وسقط حق الاسترداد لتعلق حق العبد بالثاني ونقض الأول لحق الشرع وحق العبد مقدم لحاجته ولأن الأول مشروع بأصله دون وصفه والثاني مشروع بأصله ووصفه فلا يعارضه مجرد الوصف ولأنه حصل بتسليط من جهة البائع. (الهداية: ٦٢/٣، ٦٤، فصل فى احكام البيع الفاسد)

وفى الدر المختار: وإذا ملكه تثبت كل أحكام الملک، وفى الشامية: فيكون المشتري خصماً لمن يدعيه لأنه يملک رقبته نص عليه محمد، ولو باعه كان الثمن له. (الدر المختار مع رد المحتار: ٩٠/٥، سعيد)

وفي حاشية الطحطاوي: قوله ملكه أى ملک عينه ہو قول أئمة بلخ بدليل أن المشتري إذا أعتقه بعد قبضه صح وكان الولاء له ولو باعه كان الثمن له. (حاشية الطحطاوى على الدر المختار: ٧٨/٣، كوئته. وكذا فى فتح القدير: ٤٥٩/٦، ٤٦٦، فصل فى احكامه، دار الفكر)

There is one objection which could be made. The jurists say that when a transaction is invalid and the item is re-sold, then the profits obtained from the sale will necessarily have to be given in charity (*wajib at-taṣadduq*).

ولو اشترى جارية شراءً فاسداً وقبضها وباعها وربح فيها تصدق بالربح ولو اشترى بثمنها شيئاً آخر فربح فيه طاب له الربح. كذا فى السراج الوهاج. (الفتاوى الهندية: ١٤٩/٣)

However, because transactions nowadays are actually mutual exchanges [of money and goods], and there is no sign of an offer and acceptance (ījāb wa qabūl), the precondition was merely written down in the sale agreement. The sale agreement was received either before the sale or after it. If it was received before the agreement, it is classified as a promise. Even if it is after the sale, the precondition is like a promise which does not invalidate the transaction.

قلت: وفي جامع الفصولين أيضاً: لو ذكرا البيع بلا شرط ثم ذكرا الشرط على وجه العدة جاز البيع ولزم الوفاء بالوعد، إذ المواعيد قد تكون لازمة فيجعل لازماً لحاجة الناس ...(تنبيه) في جامع الفصولين أيضاً: لو شرط شرطاً فاسداً قبل العقد ثم عقدا لم يبطل العقد. (فتاوى الشامى: ٨٤/٥، مطلب فى الشرط الفاسد، سعيد)

Imdād al-Aḥkām:

If an offer and acceptance on a transaction is made and no condition – such as the right to return the sale-item – is laid down in the offer and acceptance, instead, after the offer and acceptance, the condition to return the item is made; then this is unanimously valid. لخلو العقد عن الشرط If there is no attached condition in a verbal offer and acceptance, then writing down the condition immediately in a bayʿānah will not make it unlawful.

لأن الأصل فى العقود القول والكتابة وثيقة، والله تعالىٰ أعلم. حرره الأحقر ظفر أحمد عفى عنہ، أصل الجواب وكذا تصحيحہ صحيحان. أشرف علي.[1]

Allāh ta'ālā knows best.

Trading in items which are used for magic

Question

Is it permissible to trade in items which are used for magic, e.g. bones, hair, etc.?

Answer

If the seller knows with certainty that these items will be used to perform magic, it is makrūh for him to sell them. This is because there is a clear indication that he is aiding in sin. However, it is not permissible to trade in human bones and hair.

البحر الرائق:

قولہ وشعر الإنسان والانتفاع بہ، أى لم يجز بيعہ والانتفاع بہ لأن الآدمي مكرم غير مبتذل فلا يجوز أن يكون شيء من أجزائہ مهاناً مبتذلاً، وقد قال النبي صلى الله عليہ وسلم: لعن الله الواصلة والمستوصلة. (البحر الرائق: ٨١/٦، كوئٹہ)

وكذا فى الهداية مع العناية على هامش فتح القدير: ٤٢٥/٦، دار الفكر. وتبيين الحقائق: ٢٦/١)

وفى الهداية: ولا بأس ببيع عظام الميتة وعصبها وصوفها وقرنها وشعرها ووبرها والانتفاع بذلك كلہ لأنها طاهرة لا يحلها الموت لعدم الحياة. (الهداية: ٥٥/٣، باب البيع الفاسد)

وكذا فى الفتاوى الهندية: ١١٥/٣. وفتاوىٰ قاضيخان: ١٣٣/٢)

[1] *Imdād al-Ahkām*, vol. 3, p. 435.

تبيين الحقائق:

وكره بيع السلاح من أہل الفتنة لأنہ إعانة على المعصية، قال الله تعالیٰ: "وتعاونوا على البر والتقویٰ ولا تعاونوا على الإثم والعدوان." وإنما یکرہ بيع نفس السلاح دون ما لایقاتل بہ إلا بصنعة کالحديد لأن المعصية تقع بعين السلاح بخلاف الحديد ألا ترى أن العصير والخشب الذي يتخذ منہ المعازف لا یکرہ بیعہ لأنہ لا معصية في عينها. (تبيين الحقائق: ٢٩٦/٣، ملتان)

وكذا فى الدر المختار مع رد المحتار: ٢٦٨/٤، سعيد. وبدائع الصنائع: ١٤٢/٧، سعيد)

الفتاوى الہندية:

فإن باعہا (أى آلات المزامير) ممن يستعملہا أو يبيعہا ہذا المشتري ممن يستعملہا لا يجوز بيعہا قبل الكسر. (الفتاوى الہندية: ١١٦/٣، فصل فى بيع المحرمات)

Shāh Walī Allāh Muhaddith Dehlawī rahimahullāh writes:

أقول: الإعانة فى المعصية وترويجہا وتقريب الناس إليہا معصية وفساد فى الأرضي الله عنہ. (حجة الله البالغة: ١٩٢/٢، البيوع المنہى عنہا، قديمى كتب خانہ)

Allāh ta'ālā knows best.

Selling idols made of steel

Question

Is it permissible for a person to sell idols made of steel? If it is prohibited, can he sell them by only calculating the cost of the steel or brass?

Answer

It is prohibited to sell an idol made of steel or brass. If only the cost of the steel is calculated and sold, a person should still abstain from selling it because the buyer will most likely use it for committing a sin. This, notwithstanding the fact that the steel or brass is used for other purposes. Yes, it will be permissible to sell it if the person first breaks it into pieces.

عن جابر بن عبد اللّٰہص أنہ سمع رسول اللّٰہ صلی اللّٰہ علیہ وسلم یقول عام الفتح وہو بمکۃ: ”إن اللّٰہ ورسولہ حرم بیع الخمر والمیتۃ والخنزیروالأصنام -(رواہ البخاری،باب بیع المیتۃ والاصنام،۱/۲۹۸)-

Rasūlullāh sallallāhu ʿalayhi wa sallam said on the occasion of the Conquest of Makkah: Allāh and His Messenger prohibited the sale of wine, carrion, pigs and idols.

عمدة القاری:

لا یجوز بیع المیتة والأصنام لأنہ لا یحل الانتفاع بها ووضع الثمن فیها إضاعة المال، وقد نهی الشارع عن إضاعتہ، قلت: علی ہذا التعلیل إذا کسرت الأصنام وأمکن الانتفاع برضاضها جاز بیعها عند بعض الشافعیة وبعض الحنفیة. (عمدة القاری: ۵۶۹/۸، باب بیع المیتة والاصنام، ملتان)

وفي سبل السلام: وأما علة تحریم بیع الأصنام فقیل لأنها لا منفعة فیها مباحة، وقیل إن کانت بحیث إذا کسرت تنفع بأکسارہا جاز بیعها والأولیٰ أن یقال: لا یجوز بیعها وہي أصنام للنهي ویجوز بیع کسرہا إذ ہي لیست بأصنام ولا وجہ لمنع بیع الأکسار أصلاً. (سبل السلام: ۵/۳، کتاب البیوع، لمحمد بن اسمعیل الصنعانی)

وفي شرح السنة للإمام البغوي: وفي تحريم بيع الأصنام دليل على تحريم بيع جميع الصور المتخذة من الخشب والحديد والذهب والفضة وغيرها، وعلى تحريم بيع جميع آلات اللهو والباطل مثل الطنبور والمزمار والمعازف كلها، فإذا طمست الصور، وغيرت آلات اللهو عن حالتها، فيجوز بيع جواهرها وأصولها، فضة كانت أو حديداً أو خشباً أو غيرها. (شرح السنة للامام البغوى: ٢٨/٨، المكتب الاسلامى)

<u>الدر المختار:</u>

قال اشترى ثوراً أو فرساً من خزف لأجل استئناس الصبي لا يصح، وفى الشامية: قوله من خزف أى طين قال ط: قيد به لأنها لو كانت من خشب أو صفر جاز اتفاقاً فيما يظهر لإمكان الانتفاع بها وحرره، وهو ظاهر. (الدر المختار مع فتاوى الشامى: ٢٢٦/٥، باب المتفرقات، سعيد)

Kitāb al-Fatāwā:

It is <u>h</u>arām to both make and sell statues. The income obtained from their sale is unlawful.[1]

Jawāhir al-Fatāwā:

Rasūlullāh <u>s</u>allallāhu ʿalayhi wa sallam prohibited the manufacture of idols, their buying and selling, and using the income obtained from their sale. Therefore, it is prohibited to make the various types and forms of statues. Trading in them is impermissible irrespective of whether the statues are made of silver, copper, brass, rock, plastic or any other material.[2]

Īdā<u>h</u> al-Masā'il:

It is totally forbidden to make statues of copper, brass, steel, other metals, wood, etc. However, if the objective is the monetary value and the shape and appearance is subservient to its actual value, and the entire transaction is based on weight; then in such a case the income

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[1] *Kitāb al-Fatāwā*, vol. 5, p. 268.

[2] *Jawāhir al-Fatāwā*, vol. 3, p. 210.

obtained from it will not be totally unlawful. Nonetheless, because it entails assisting in a sin, the income will be makrūh and doubtful. This is why one trader should even desist from trading with another businessman in such items. If the objective is not the monetary value, but the shape and appearance, then the trade and the money obtained are haram.[1]

Further reading: *Īdāh an-Nawādir*, vol. 1, pp. 79-84.

Allāh taʿālā knows best.

Asking the buyer to pay for the legal expenses

Question

ʿAmr bought an item from Zayd, and it was agreed that he will pay Zayd on a certain date. Even after the passing of that date, ʿAmr did not pay what he owed. Zayd took him to court. Can Zayd ask ʿAmr [the buyer] to pay for the legal expenses?

Answer

The scholars differ on the issue of asking the buyer to pay the legal expenses. Some scholars such as Hadrat Maulānā ʿAbd al-Hayy Lucknowī rahimahullāh say that it is not permissible to collect the legal expenses from the buyer. Other scholars like Hadrat Maulānā Rashīd Ahmad Gangohī rahimahullāh say that it is permissible to collect the legal expenses from the buyer.

Hadrat Maulānā Muftī ʿAzīz ar-Rahmān Sāhib quotes both opinions in *Fatāwā Dār al-ʿUlūm Deoband* and goes into a detailed discussion. He then says that the view of Hadrat Maulānā Rashīd Ahmad Gangohī rahimahullāh seems to be more worthy of preference because in our times, there are innumerable failings in the fulfilment of rights and dues. In fact, this ailment has become common since the era before ours. This is why the jurists clearly state that the one who is owed can take from his debtor in whatever way he can, even if it is not the same category of what he is owed.[2]

In the above case, the buyer is deferring the payment and refusing even though he has the means to pay. The seller is forced to prosecute him so that he can collect his debt. In such a case, it is permissible to collect the legal expenses from the obstinate buyer.

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[1] *Īdāh al-Masā'il*, p. 156.

[2] *ʿAzīz al-Fatāwā*, vol. 1, p. 627.

Imdād al-Fatāwā:

If a person is forced to open a court case for the preservation of his rights and dues, and he has to bear many expenses because of his adversary responding in an argumentative and quarrelsome manner, then according to many 'ulamā' – including Maulānā Rashīd Ahmad [Gangohī] Sāhib – it is permissible to make him pay for the expenses.[1]

Further reading: *'Azīz al-Fatāwā*, vol. 1, pp. 626-628; *Fatāwā Mahmūdīyyah*, vol. 16, p. 460; *Imdād al-Ahkām*, vol. 3, p. 460.

Objection:

Some scholars make an objection that the buyer is merely the cause while the seller is the direct pursuer; and the payment has to be borne by the pursuer and not the cause. Therefore, it is not permissible to ask the buyer (cause) to pay for the legal expenses. What is the answer to this?

Answer:

While it is true that the jurists laid down this principle, they also explained certain exceptions to it. For example, 'Allāmah Ibn Nujaym Misrī writes in *al-Ashbāh Wa an-Nazā'ir*: تضمين الساعي is excluded from this rule. Although the *si'āyah* (slander) is merely the cause, latter day 'ulamā' say that it warrants the obligation of paying the liability.

القاعدة التاسعة عشر: إذا اجتمع المباشر والمتسبب أضيف الحكم إلى المباشر... وخرجت عنها مسائل... الخامسة: الإفتاء بتضمين الساعي وهو قول المتأخرين لغلبة السعاية. (الاشباه والنظائر: ٤٠٥/١، الفن الاول فى القواعد الكلية)

وفى مجمع الضمانات: وضمن عند محمد وبه يفتىٰ لغلبة السعاية في زماننا. (مجمع الضمانات: ٣٦٢/١)

وللاستزادة انظر: معين الحكام فيما يتردد بين الخصمين من الاحكام: ١٥٦، فى بيان القضاء بانواع الضمانات الواجبة، وكيفيتها. ومجمع الضمانات:

[1] *Imdād al-Fatāwā*, vol. 3, p. 123.

١/٣٦٠-٣٦٢. وخلاصة الفتاوىٰ: ٤/٢٦٠، الجنس السادس فى السعاية، المكتبة الرشيدية.

Allāh ta'ālā knows best.

Trading in shares with the precondition of a loan

Question

Shares will be sold to the members of a company. The one who buys the shares will be liable to give a loan of R320.00 to the company. The company will then pay back the members the loaned amount, together with five percent as a profit. Is this agreement lawful?

Answer

The first fault with this agreement is that it contains an invalid condition, viz. it is obligatory on every share-buyer to give a loan of R320.00. The jurists prohibit such a condition. The second fault is that those who give the stipulated amount will receive a percentage of the amount. This is also unlawful because in a muḏārabah agreement, a person must receive a share of the profits; not a share of the amount. If the company said that the muḏāribīn (those who take part in the muḏārabah agreement) will receive forty percent from the profits, it will be permissible. Thereafter, whatever profits the company makes – all the muḏāribīn will receive forty percent according to their number of shares.

Another prerequisite is that the company whose shares are being sold must have something tangible or properties in its ownership. For example, a man buys a house and sells its shares to other people. If the company owns nothing at present, and shares are being sold to people, then this is not permissible. Yes, if amounts are taken from people, a house is then bought with that money, and they are made equal shareholders in that house, it will be permissible. However, bear in mind that this is not a sale of the shares. Rather, they are made shareholders with respect to the house.

الدر المختار:

ولا بيع بشرط لا يقتضيه العقد ولا يلائمه وفيه نفع لأحدهما. (الدر المختار: ٥/٨٥، سعيد)

رد المحتار:

قوله مثال لما فيه نفع للبائع، ومنه ما لو شرط البائع أن يهبه المشترى شيئاً أو يقرضه. (رد المحتار: ٨٥/٥، مطلب فى الشرط الفاسد، سعيد)

الفتاوى الهندية:

ولو باع شيئاً على أن يهب له المشتري أو يتصدق عليه أو يبيع منه شيئاً أو يقرضه كان فاسداً. (الفتاوى الهندية: ١٣٤/٣، الباب العاشر فى الشروط التى تفسد البيع)

خلاصة الفتاوىٰ:

ولو كان فى الشرط منفعة لأحد المتعاقدين بأن شرط البائع أن يقرض المشتري أو على القلب يفسد العقد. (خلاصة الفتاوىٰ: ٥٠/٣، الفصل الخامس فى البيع)

بدائع الصنائع:

ومنها أن يكون الربح جزءاً شائعاً فى الجملة لا معيناً فإن عينا عشرة أو ماءة أو نحو ذلک كانت الشركة فاسدة لأن العقد يقتضي تحقق الشركة فى الربح والتعيين يقطع الشركة لجواز أن لا يحصل من الربح إلا القدر المعين لأحدهما فلا يتحقق الشركة فى الربح. (بدائع الصنائع: ٥٩/٦، كتاب الشركة، فصل فى الشرائط العامة، سعيد)

(وكذا فى الدر المختار مع رد المحتار: ٣٠٥/٤، كتاب الشركة، سعيد)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

One of the modern forms of partnership is when a shop or factory owner says to his relatives and friends: “Invest such and such amount of money in the business, and you will receive a certain percentage of returns monthly.” The person invests the money and receives the stipulated percentage monthly. People generally consider this to be a

lawful enterprise whereas this is not so according to the Sharīʿah because of the following reasons:

1. When a business specifies a certain profit on an investment, it is classified as giving a loan and collecting interest for it. And this is clearly unlawful.
2. In the case where the business suffers a loss, the investor does not bear any loss. The loss is suffered by the business owner. For a partnership to be valid according to the Sharīʿah, it is essential for both to be partners in the profits and the losses. This partnership is therefore invalid.

This type of partnership is unlawful. It is essential for one to keep away from it.[1]

Islām Aur Jadīd Maʿāshī Masā'il:

The profit of each partner must be specified from the true profit which has been made, and not on the basis of what he invested. It is not permissible for a fixed amount to be specified for a partner, or for a certain percentage of the profit to be specified for him based on the investment which he made. (In other words, instead of telling a partner that he will receive such and such percentage from the true profit, he is told that he will receive a certain percentage of what he invested – the latter is not permissible).[2]

Allāh taʿālā knows best.

Agreeing on a transaction in the future tense

Question

Zayd said to ʿAmr: "I will sell you these goods after one month. If I do not sell them, you will be a representative for the sale on my behalf." What is the ruling with regard to this agreement? Has the transaction taken place? If it did not, what is the ruling?

Answer

When Zayd said: "I will sell you these goods after one month", then this is not a transaction. It is a promise for a transaction. Consequently, the rules of a transaction will not apply. It is correct to make a promise of this nature. If Zayd does not fulfil the promise, for whatever reason, and he says to ʿAmr: "I do not want to continue with

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[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 2, p. 26.

[2] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5, p. 31.

the sale. Instead, you can become my representative for the transaction," and ʿAmr accepts, then ʿAmr will become his representative.

شرح المجلة:

صيغة الاستقبال التي هي بمعنى الوعد المجرد مثل سأبيع وسأشتري ،لا ينعقد بهما البيع. (شرح المجلة لمحمد خالد الاتاسى، المادة: ١\١٧٨، ١٧١)

شرح العناية:

ولا ينعقد بلفظين أحدهما الماضي والآخر بلفظ المستقبل، وإنما لا ينعقد بذلك لأن النبي صلى الله عليه وسلم استعمل فيه لفظ الماضى الذي يدل على تحقق وجوده، فكان الانعقاد مقتصراً عليه، ولأن لفظ المستقبل إن كان من جانب البائع كان عدة لا بيعاً. (شرح العناية على هامش فتح القدير: ٢٤٩/٦، دار الفكر)

When Zayd made the promise for the sale, he ought to fulfil it. But if he cannot fulfil it due to some reason, he will not be sinning.

وقال العلماء: يستحب الوفاء بالوعد بالهبة وغيرها استحباباً مؤكداً، ويكره إخلافه كراهة تنزيه، لا تحريم. (عمدة القارى: ٣٢٩/١، ملتان)

قال فى الهداية :كل عقد جاز أن يعقده الإنسان بنفسه جاز أن يوكل به غيره، لأن الإنسان قد يعجز عن المباشرة بنفسه على اعتبار بعض الأحوال، فيحتاج إلى أن يوكل به غيره، فيكون بسبيل منه دفعاً للحاجة، وقد صح أن النبي صلى الله عليه وسلم وكل بالشراء حكيم بن حزام رضي الله عنه. (الهداية: ١٧٧/٣، كتاب الوكالة)

Allāh taʿālā knows best.

Selling an unknown item which is in a sealed box

Question

A company sells utensils in a sealed box which buyers are eager to purchase. The buyer knows that it contains utensils, but he does not know their size nor their quality. The buyer will get whatever is in his luck. However, if a utensil is faulty or broken, he has the right to return it. In this transaction, it seems that there ought to be the right to visually look at the item (*khiyār-e-ru'yat*) because the buyer is purchasing something which is concealed from him. There is no *khiyār-e-ru'yat* but there is *khiyār-e-ʿayb* (the right to return if the item is faulty or broken). What is the Sharīʿah ruling with regard to such a sale? If it is impermissible, is there any way to make it permissible?

Answer

There are two wrongs in the above transaction due to which it is invalid.

1. The sale-item is unknown.
2. After buying an item which has not been seen, the buyer ought to be given *khiyār-e-ru'yat*, and this is not found here. Even if the buyer says: "I am happy" before seeing the item, the right to look at it will not fall away. And here, there is no right at all to see the item.

The first wrong as regards the invalidity of the sale is that the item is unknown. The answer to this is that in a transaction, only that ignorance [of the item] is an invalidator of the transaction which could lead to a dispute (مفضية إلى المنازعة). Where this is not the case, and it is commonly practised in society, it is tolerable and is not an invalidator of the transaction.

والأثمان المطلقة لا تصح إلا أن تكون معروفة القدر والصفة لأن التسليم والتسلم واجب بالعقد وهذه الجهالة مفضية إلى المنازعة فيمنع التسليم والتسلم، وكل جهالة هذه صفتها تمنع الجواز هذا هو الأصل. (الهداية: ٢٠/٣)

From the above text it becomes clear that every ignorance is not an invalidator of a transaction. Rather, only the one which could lead to a dispute.

شرح المجلة:

وفى الهندية جهالة المبيع أو الثمن مانعة لجواز البيع إذا كان يتعذر معها التسليم وإن كان لا يتعذر لا يفسد العقد كما لو باع صبرة معينة ولم يعرف قدر كيلها أو باع أثواباً معينة ولم يعرف عددها، وإنما يفسد البيع بالجهالة الفاحشة إذا كان محتاجاً إلى تسليم المبيع وإلا فلا يفسد. (شرح المجلة، لسليم رستم باز، ١/١٠٢، دار الكتب العلمية)

حاشية الطحطاوى:

قوله معرفة قدر هو فى المصنف منون يشمل قدر المبيع والثمن قال فى البحر: وأشار بالمعرفة إلى أن الشرط العلم بهما دون ذكرهما كما فى الإيضاح فلو كان المبيع مجهولاً جهالة فاحشة ولم يجربها العرف لا يصح البيع. (حاشية الطحطاوى على الدر المختار: ٣/١٢، كوئته)

الفتاوى الهندية:

فإن كان مجهولاً جهالة مفضية إلى المنازعة يمنع صحة العقد، وإلا، فلا. (الفتاوى الهندية: ٤/٤١١، كتاب الاجارة)

فتاوى الشامى:

قوله وشرط لصحته معرفة قدر مبيع وثمن ككر حنطة وخمسة دراهم أو أكرار حنطة فخرج ما لو كان قدر المبيع مجهولاً أى جهالة فاحشة، فإنه لا يصح وقيدنا بالفاحشة لما قالوه لو باعه جميع ما في هذه القرية أو هذه الدار والمشتري لا يعلم ما فيها لا يصح لفحش الجهالة، أما لو باعه جميع ما في هذا البيت أو الصندوق أو الجوالق فإنه يصح لأن الجهالة يسيرة. (فتاوى الشامى: ٤/٥٢٩، كتاب البيوع، سعيد)

البناية فى شرح الهداية:

وكل جهالة ہذه صفتها تمنع الجواز أى جواز العقد ہذا أى كون الجهالة المفضية إلى المنازعة مانعة ہو الأصل أى في كتاب البيوع بالإجماع لأن شرعية المعاملات لقطع المنازعات المفضية إلى الفساد. (البناية فى شرح الهداية: ۱۵/۳)

Shāh Anwar Shāh Kashmīrī (d. 1352 A.H.) writes:

قلت: إن الناس يعاملون في أشياء تكون جائزة فيما بينهم على طريق المروءة والإغماض، فإذا رفعت إلى القضاء يحكم عليها بعدم الجواز... وذلك لأن العقود على نحوين: نحو: يكون معصية في نفسه، وذا لا يجوز مطلقاً، ونحو آخر: لا يكون معصية وإنما يحكم عليه بعدم الجواز لافضاءه إلى المنازعة فإذا لم تقع فيه منازعة جاز. (فيض البارى: ۲۸۹/۳، كتاب الوكالة)

ʻAlī Ahmad Nadwī writes:

الجهالة ليست بمانعة لذاتها، بل لكونها مفضية إلى النزاع، وہذا أصل مهم ينبغى التعويل عليه فى الأحكام، فإن به حل كثير من المشكلات، وليعلم أن أحكام المعاملات الشرعية مبنية على أصلين عادلين:

الأول: منع كل ما فيه ظلم وأكل لأموال الناس بالباطل.

الثاني: منع ما يؤدي إلى الاختلاف والنزاع بسبب الجهالة، فإذا انتفى ما يؤدي إلى الظلم والنزاع بسبب الجهالة، صح التعامل، والعرف أصل عظيم يرجع إليه في ذلك بعد الشرع. (جمہرة القواعد الفقهية فى المعاملات المالية: ۳۱۹/۱، تحت القاعدة: الجهالة انما توجب الفساد اذا كانت مفضية الى النزاع المشكل)

Hadrat Muftī Walī Hasan rahimahullāh writes:

A general principle is that an ignorance which is a cause of dispute is prohibited, while the one which does not cause a dispute is not prohibited.[1]

The second wrong with this transaction is the absence of *khiyār-e-ru'yat*. One way to rationalize it is that nowadays, transactions are done by mutual exchange. There is no offer and acceptance at all. This means that *khiyār-e-ru'yat* is not negated in the transaction. Thus, if a sealed box is bought through mutual exchange, and the buyer promises – either before or after buying the item – that he will not return it after seeing what is in the box, then the buyer will have to abide by his promise.

لو ذكر البيع بلا شرط، ثم ذكر الشرط على وجه العدة، جاز البيع ولزم الوفاء بالوعد، إذ المواعيد قد تكون لازمة فيجعل لازماً لحاجة الناس. (شرح المجلة، فصل فى حق البيع بشرط، ٦١/٢)

Allāh ta'ālā knows best.

Deferring a payment in an unstipulated transaction

Question

1. A person sold a book for R50.00. The buyer said to him: "I will pay you later on." Is this permissible?

2. What if the seller said: "I am selling the item on condition that you pay me in January or February"?

Answer

If he made this statement after the completion of the sale, there is no problem with it; it is an unstipulated transaction. If the date of payment is not known, there is no harm in it. If he bought it on the condition that he will buy it on credit and the date of payment is not specified, then this is impermissible. In short, in a credit transaction, it is necessary to specify the date of payment; and in an unstipulated transaction, ignorance about the date of payment will not harm the transaction.

[1] *Dars al-Hidāyah*, part three, p. 29.

الهداية:

بخلاف ما إذا باع مطلقاً ثم أجل الثمن إلى ہذه الأوقات أى إلى الحصاد وغيره حيث جاز لأن ہذا تأجيل فى الدين وہذه الجہالة فيہ متحملة. (الهداية: ٦١/٣)

شرح المجلة:

وفي جامع الفصولين: الرواية محفوظة أنہ لو باع مطلقاً ثم أجل الثمن إلى حصاد ودياس لا يفسد ويصح الأجل. ووجهوه بأن التأخير بعد البيع تبرع فيقبل التأجيل إلى الوقت المجهول. (شرح المجلة للاتاسى، المادة: ٢٤٨،١٦٨/٢، الفصل الثانى. وكذا فى الدر المختار مع رد المحتار: ٥٣٢/٤، مطلب فى التاجيل الى اجل مجهول، سعيد. و ٨٢/٥، باب البيع الفاسد، سعيد)

2. The second scenario is not permissible. Yes, he must specify a date. Later on, the buyer may request the seller for a respite. This is permissible.

يلزم أن تكون المدة معلومة فى البيع بالتأجيل والتقسيط ، لأن جہالتہ تفضي إلى النزاع ، فالبائع يطالب في مدة قريبة، والمشتري يأباہا ، فيفسد البيع ، بحر- (شرح المجلة للاتاسى، المادة: ٢٤٦،١٦٧/٢)- واللهگ اعلم-

Allāh taʿālā knows best.

When there is a dispute on taking possession of an item

Question

A person bought a tree. He now wants to uproot it, but the seller is saying that he must chop it off from above the ground. Who is in the right?

Answer

At the time of the sale, the tree was sold without any precondition. The buyer can therefore uproot it provided there is no fear of the process causing damage to a nearby well or wall. If not, he will have to chop it off from above the ground. If he bought it on the condition that he will chop it off from above the ground, it will be necessary for him

to act accordingly. If no condition was laid down, the buyer and seller will have to act according to societal norms.

البحر الرائق:

وفيها إذا اشترى شجرة للقلع فإنه يؤمر بقلعها بعروقها وليس له حفر الأرض إلى انتهاء العروق بل يقلعها على العادة إلا إن شرط للبائع القلع على وجه الأرض أو يكون فى القلع من الأصل مضرة على البائع كما إذا كانت بقرب حائط أو بئر لأنه فإنه يقطعها على وجه الأرضي الله عنه. (البحر الرائق: ٢٩٤/٥، كتاب البيع، فصل يدخل البناء والمفاتيح فى بيع الدار)

رد المحتار:

اشترى شجرة للقلع يؤمر بقلعها بعروقها وليس له حفر الأرض إلى انتهاء العروق بل يقلعها على العادة إلا إن شرط البائع القطع على وجه الأرض أو يكون فى القلع من الأصل مضرة للبائع ككونها بقرب حائط أو بئر فيقطعها على وجه الأرضي الله عنه. (رد المحتار: ٥٥٤/٤، كتاب البيوع، مطلب فى بيع الثمر والزرع والشجرمقصوداً، سعيد)

خلاصة الفتاوىٰ:

ولو اشترى الشجر مطلقاً له أن يقطع من الأصلى الله عليه وسلم. (خلاصة الفتاوىٰ: ٢٨/٣، كتاب البيوع، الفصل الثالث فيما يجوز بيعه وفيما لا يجوز)

فتاوىٰ قاضيخان:

رجل اشترى شجرة بشرط أن يقلعها تكلموا في جوازه والصحيح أنه يجوز وللمشتري أن يقلعها من أصلها، وإن اشترى بشرط القلع... وله أن يقطعها من وجه الأرض فأما عروقها فى الأرض لا تكون له إلا بالشرط. (فتاوىٰ قاضيخان على هامش الهندية: ٢٤٥/٢، كتاب البيوع)

وللاستزادة: انظر: (الفتاوى الهندية: ٣٥/٣، كتاب البيوع، باب ما يجوز بيعه وما لا يجوز. فتاوى حقانيہ: ٦٠/٦، كتاب البيوع، باب ما يجوز بيعه وما لا يجوز)

ʿIṯr Hidāyah:

If the practice in that area is to chop off the tree from above the ground or by digging one metre down and then chopping it off, then they will have to act according to the practice of the people of that area. The trees which surround this particular tree will not be uprooted unless it is clearly agreed upon at the time of the transaction that the surrounding trees will be uprooted.

If digging the tree will cause damage to whatever is nearby, e.g. a well or a wall, then the buyer will be prevented from digging it out.[1]

Allāh taʿālā knows best.

Selling a cow on the condition that it is pregnant

Question

A person bought a cow on the condition that it is pregnant with a calf. But it turned out that it did not have a calf. Can he return it?

Answer

The jurists says that a transaction with the precondition that an animal is pregnant is invalid. When a transaction is invalid, it is obligatory to return the item. The person must cancel the transaction and enter into a new transaction without laying down this condition. He must buy it without any condition. Yes, if the seller makes a promise that this cow or goat is pregnant, does not lay down a condition in the transaction, and says: "I promise that if it is not pregnant, I will take it back." The buyer may then return it as per the promise.

فتح القدير:

فعلى هذا يتفرع ما لو باع ناقة أو شاة على أنها حامل أو تحلب كذا فسد البيع. (فتح القدير: ٥٢٨/٦، دار الفكر)

[1] *ʿIṯr Hidāyah*, p. 186.

الدر المختار:

بخلاف شراءه شاة على أنها حامل أو تحلب كذا رطلاً ...فسد لأنه شرط فاسد لا وصف. وفى الشامية: قوله لأنه شرط فاسد، لأنه شرط زيادة مجهولة لعدم العلم بها... لأن ما فى البطن والضرع لا تعلم حقيقته. (الدر المختار مع رد المحتار: ٥٨٨/٤، سعيد)

شرح المجلة:

ولو باع شاة على أنها حامل فسد البيع لأن الولد زيادة مرغوبة وأنها موهومة لا يدرى وجودها فلا يجوز. (شرح المجلة ٦٧/٢، لمحمد خالدالاتاسى)

لو ذكر البيع بلا شرط، ثم ذكر الشرط على وجه العدة، جاز البيع ولزم الوفاء بالوعد، إذ المواعيد قد تكون لازمة فيجعل لازماً لحاجة الناس. (شرح المجلة للاتاسى، فصل فى حق البيع بشرط، ٦١/٢)

Allāh ta'ālā knows best.

When an item is less than what was specified

Question

Zayd bought a three acre plot from 'Umar for R300 000.00 – i.e. R100 000.00 for each acre. Later on, he realized that the plot was actually less than three acres. Can he pay less than what was agreed upon?

Answer

He has the right to reduce the payment in proportion to whatever was less than the agreed acreage.

الهداية:

ولو قال بعتكها على أنها مائة ذراع بمائة درهم كل ذراع بدرهم فوجدها ناقصة فالمشتري بالخيار إن شاء أخذها بحصتها من الثمن وإن شاء ترك لأن الوصف

وإن كان تابعاً لكنه صار أصلاً بإفراده بذكر الثمن. (الهداية: ٢٣/٣، كتاب البيوع)

<u>تبيين الحقائق:</u>

ولو قال كل ذراع بكذا ونقص أخذه بحصته أو ترك وإن زاد أخذ كله كل ذراع بكذا أو فسخ. معناه أنه إذا قال بعتكه على أنه عشرة أذرع كل ذراع بدرهم مثلاً فوجده ناقصاً فهو بالخيار إن شاء أخذه بحصته وإن شاء تركه وإن وجده زائداً أخذه كله كل ذراع بدرهم أو فسخ لأن الذراع وإن كان وصفاً يصلح أن يكون أصلاً لأنه عين ينتفع به بانفراده فاذا سمى لكل ذراع ثمناً جعل أصلاً وإلا فهو وصف فإذا صار أصلاً فإن وجده ناقصاً أخذه بحصته ويثبت له الخيار لتفرق الصفقة عليه. (تبيين الحقائق: ٦/٤، كتاب البيوع، ملتان)

وللاستزادة انظر: (منحة الخالق على هامش البحر الرائق: ٢٩١/٥، كوئته)

Allāh ta'ālā knows best.

Trading in heaps of rice

<u>Question</u>

A person has a heap of rice and says: "Ten rands for each kilo." Is this transaction correct?

<u>Answer</u>

This transaction is correct and permissible according to Imām Abū Yūsuf and Imām Muhammad rahimahumallāh; and the fatwā is issued on their verdict.

الهداية:

ومن باع صبرة طعام كل قفيز بدرهم جاز البيع في قفيز واحد عند أبي حنيفة إلا أن يسمى جملة قفزانها وقالا: يجوز فى الوجهين. (الهداية: ٢٢/٣، كتاب البيوع)

البحر الرائق:

وظاهر ما فى الهداية ترجيح قولهما لتأخير دليلهما كما هو عادته وقد صرح فى الخلاصة في نظيره بأن الفتوىٰ على قولهما... قال الفقيه أبو الليث والفتوىٰ على قولهما تيسيراً للأمر على المسلمين. وعلى هامشه (قوله وقد صرح فى الخلاصة فى نظيره) قال فى النهر وفي عيون المذاهب به يفتىٰ لا لضعف دليل الإمام بل تيسيراً على الناس... وعزا فى الدر المختار مثل ما فى النهر إلى الشرنبلالية عن البرهان والقهستاني عن المحيط وغيره. (البحر الرائق مع منحة الخالق: ٢٨٥/٥، كتاب البيع، كوئتة)

حاشية الشرنبلالية:

قوله وقالا: يجوز مطلقاً قال وفى البرهان وبه يفتىٰ وذكر وجهه. (حاشية الشرنبلالية على الدرر: ١٤٧/٢)

وللاستزادة انظر: (خلاصة الفتاوىٰ: ٣٢/٣. ورد المحتار: ٥٤٠/٤، سعيد. وحاشية الطحطاوى على الدر المختار: ٧/٣، كوئتة. والبناية: ٣٨/٧)

Allāh taʿālā knows best.

Forfeiting the leverage amount in a transaction

Question

Zayd spoke to ʿUmar about buying a car from him. He gave an amount as *bayʿānah* (leverage, earnest money) and said: "If I do not buy it, you may appropriate the *bayʿānah*. Subsequently, Zayd did not buy the car due to some reason or the other. Is it permissible to appropriate the

bayʿānah? In the case where he buys the car, is the transaction invalid because of the invalid condition which was laid down?

Answer

It is not permissible to appropriate the *bayʿānah.*

This is how a *bayʿānah* is normally done. A person intends buying a property. Before the paperwork can be written, signed and the transaction completed; the buyer gives a down-payment. Then when the entire amount is paid, the down-payment is subtracted from the total. It is permissible to conduct a *bayʿānah* in this way.

Unfortunately, nowadays, if the buyer is not able to buy the property which had been agreed upon, then the *bayʿānah* is not returned to him. The seller takes possession of it. According to the Sharīʿah, it is not permissible for the seller to do this. Furthermore, an agreement of this nature is similar to gambling. In his *Hujjatullāh al-Bālighah*, Hadrat Shāh Walī Allāh Muhaddith Dehlawī rahimahullāh states that appropriating the *bayʿānah* in this way is synonymous to gambling.

قال: ونهى عن بيع العربان أن يقدم المشتري إلى البائع شيء من الثمن، فإن اشترى حسب من الثمن، وإلا فهو له مجاناً، وفيه معنى الميسر. (حجة الله البالغة: ٢/١٩١، البيوع المنهى عنها، قديمى كتب خانه)

A Hadīth states:

مالک من الثقة عنده عن عمرو بن شعيب عن أبيه عن جده أن رسول الله صلى الله عليه وسلم نهى عن بيع العربان. (رواه مالک فى المؤطا، ص ٥٦٨، ما جاء فى بيع العربان. وابو داود: ٢/٤٩٤. وابن ماجة: ١٥٨، باب بيع العربان. والبيهقى فى سننه الكبرى: ٥/٣٤٢)

قال أبو عبد الله: العربان أن يشترى الرجل دابة بمائة دينار فيعطيه دينارين عربوناً فيقول: إن لم أشتر الدابة فالديناران لک. (سنن ابن ماجة، باب بيع العربان، ص١٥٨)

Rasūlullāh sallallāhu ʿalayhi wa sallam prohibited earnest money. Abū ʿAbdillāh ibn Mājah said: The word *al-ʿArbān* means: A person buys an animal for one hundred dīnārs (for example), and gives two dīnārs to

the seller saying: "If I do not buy the animal, the two dīnārs are for you."

جمهور علماء الأمصار على أن بيع العربان غير جائز... وإنما صار الجمهور إلى منعه لأنه من باب الغرر والمخاطرة وأكل المال بغير عوض. (بداية المجتهد: ٨/٥)

Ta'līfāt Rashīdīyyah:

It is impermissible to pay *bayʿānah* in the sense that if the transaction goes through, the *bayʿānah* will be included in the total amount; and if the transaction does not go through, then the *bayʿānah* will be appropriated. لأن النبي صلى الله عليه وسلم نهى عن بيع العربان. However, if an agreement is made that in the event that the sale does not take place, the *bayʿānah* will be returned, then this will be permissible.[1]

Islām Aur Jadīd Maʿāshī Masā'il:

Imām Mālik, Imām Abū Hanīfah and Imām Shāfiʿī rahimahumullāh say that it is not permissible to lay down the condition that if the sale does not take place, the seller will appropriate the money. This is because the money has gone to the seller without anything given in return. Imām Ahmad ibn Hambal rahimahullāh is of the view that *bayʿ al-ʿarbān* is permissible. Therefore, the act of appropriating the money by the seller is permissible.[2]

Further reading: *Fatāwā Mahmūdīyyah*, vol. 24, p. 201; *Fatāwā Haqqānīyyah*, vol. 6, p. 99; *Gharar Kī Sūratei*, pp. 130-158.

In the case where the buyer buys the item, the transaction will not be invalidated because the invalid condition was made before the transaction.

بقي ما إذا ذكر الشرط قبل العقد ثم عقد خالياً عن الشرط، وقد ذكره فى الثامن عشر من جامع الفصولين حيث قال: شرطا شرطاً فاسداً قبل العقد، ثم عقدا، لم يبطل العقد. (شرح المجلة للاتاسى، فصل فى حق البيع بالشرط، ٦١/٢)

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[1] *Ta'līfāt Rashīdīyyah*, p. 405.

[2] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 4, p. 159.

وكذا ذكره ابن عابدين فى حاشيته على الدر المختار: ٨٤/٥، مطلب فى الشرط الفاسد اذا ذكر بعد العقد او قبله، سعيد)

Objection:

The *Musannaf* of ʻAbd ar-Razzāq contains a narration which states that *bayʻ al-arbān* is permissible. Imām Ahmad ibn Hambal rahimahullāh has based his opinion on this narration. What is the answer to it?

قال فى التلخيص الحبير: قال عبد الرزاق في مصنفه: أنا الأسلمي عن زيد بن أسلم سئل رسول الله صلى الله عليه وسلم عن العربان فى البيع فأحله وهذا ضعيف مع إرساله والأسلمي هو إبراهيم بن محمد بن أبي يحيىٰ. (التلخيص الحبير: ٤٠/٣)

وفى نيل الأوطار: أخرج عبد الرزاق في مصنفه عن زيد بن أسلم... إلى قوله وهو مرسل وفي إسناده إبراهيم بن أبي يحيىٰ وهو ضعيف. (نيل الاوطار: ١٦٢/٥)

Imām Ahmad ibn Hambal rahimahullāh also presents an incident from *Sahīh Bukhārī* as a proof:

واشترى نافع بن عبد الحارث داراً للسجن بمكة من صفوان بن أمية على أن عمر رضي الله عنه رضي بالبيع فالبيع بيعه وإن لم يرض عمر رضي الله عنه فلصفوان أربع مائة دينار وسجن ابن الزبير رضي الله عنه بمكة. (بخارى شريف: ٣٢٧/١، باب الربط والحبس فى الحرم. واخرجه عبد الرزاق فى مصنفه: ١٤٧/٥، باب الكراء فى الحرم)

In the above incident, four hundred dīnārs were given as *bayʻānah.*

Answer:

The answer has been given by ʻAllāmah ʻAynī and Hāfiz Ibn Hajar rahimahumallāh.

وأجيب بأنه لم يكن داخلاً في نفس العقد بل هو وعد أو هو مما يقتضيه العقد أو كان بيعاً بشرط الخيار لعمر رضي الله عنه أو إنه كان وكيلاً لعمر

رضي الله عنه وللوكيل أن يأخذ لنفسه إذا رده الموكل بالعيب ونحوه. (عمدة القارى: ٩/١٥١)

فتح البارى:

وأما كون نافع شرط لصفوان أربع مائة إن لم يرض عمر رضي الله عنه فيحتمل أن يكون جعلها في مقابلة انتفاعه بتلك الدار إلى أن يعود الجواب من عمر رضي الله عنه. (فتح البارى: ٥/٧٦)

The issue is a contentious one and due to necessity, Hadrat Muftī Taqī ʻUthmānī Sāhib issued a fatwā on the view of Imām Ahmad rahimahullāh. The following is stated in *Islām Aur Jadīd Maʻāshī Masā'il:*[1]

Since the issue is a contentious one, *ʻarbūn* cannot be unilaterally classified as invalid. Sometimes, we are faced with the need for a transaction of this nature. This is especially so in our times when there is international trade from one country to another, and a hand to hand transaction is not and cannot be effected. If a person makes an agreement with another by saying: "I am ordering the goods for you", the seller then obtains the goods, does everything else which is needed to be done, spends hundreds of thousands of rupees, and then the buyer goes back on his word and says that I am not buying the goods. In such a case, the seller will suffer astronomical losses. If the seller lays down the condition of *ʻarbūn* so that the buyer remains bound, then I see a leeway for such a transaction by acting on the view of Imām Ahmad ibn Hambal rahimahullāh. As for instances when there is no need to resort to this condition, and people have made it a means to accumulate money, then it is unlawful.

Muftī Taqī ʻUthmānī Sāhib quotes from his father, Hadrat Muftī Muhammad Shafīʻ Sāhib, who said that Hadrat Maulānā Ashraf ʻAlī Thānwī Sāhib rahimahullāh said: At the time of necessity or when there is general suffering in transactions, Hadrat Gangohī rahimahullāh gave permission to issue a fatwā on the verdict of another madh-hab.[2]

As for the narration of *Sunan Ibn Mājah*, it is a weak narration.

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[1] *Islām Aur Jadīd Maʻāshī Masā'il*, vol. 4, p. 161.

[2] Muftī Taqī ʻUthmānī: *Ghayr Sūdī Bankārī*, p. 288.

إسناده ضعيف، لانقطاعه، فقد رواه مالک بلاغاً عن عمرو بن شعيب أخرجه مالک فى المؤطا (٣٧٧) وأحمد (١٨٣/٢) وأبو داود (٣٥٠٢) وانظر: تحفة الأشراف (٨٨٢٠\٣٤٢\٦) وتهذيب الكمال (١٠٠/٣٥) ومصباح الزجاجة (ص ١٣٨) والمسند الجامع (٨٤٦٩\١١٥\١١) وضعيف ابن ماجة للألباني (٤٧٥) وہو مكرر ما بعده. وعن مالك بن أنس قال: حدثنا عبد الله بن عامر الأسلمي عن عمرو بن شعيب عن أبيه عن جده... وإسناده ضعيف، لضعف عبد الله بن عامر الأسلمي. (سنن ابن ماجه بتعليق الدكتور بشار عواد: ٥٤٣/٣)

وفي حاشية السندي على ابن ماجة: وروى عن ابن عمر رضي الله عنه أنه أجاز ہذا البيع ويروى عن عمر رضي الله عنه ومال أحمد إلى القول بإجازته وضعف الحديث فيه لأنه منقطع يقال: رواه مالك عن ابن شعيب بلاغاً. (حاشية السندى على سنن ابن ماجة: ٤١٥/٤)

Allāh taʿālā knows best.

Trading in fish which are in a pond

Question

I sell fish which I purchase from various places. Which of the following ways are permissible:

1. I buy fish after they have been fished out of a pond.

2. I buy fish which are in the pond because the pond was made specifically for the fish. It is easy to catch them because the pond is small. The land on which the pond is belongs to the owner.

3. If it requires more effort to catch the fish in the case where the pond is large, what is the ruling with regard to buying the fish?

4. The pond does not belong to anyone but few people control it. They permit people to catch the fish and collect their share from them.

5. The pond is not owned by anyone, but we made arrangements for water to flow into it.

Kindly provide a short answer for the above.

Answer

1. It is permissible to buy the fish after they have been removed from the pond. The person is able to catch the fish easily.

وفسد بيع سمك لم يصد أو صيد ثم ألقي في مكان لا يؤخذ منه إلا بحيلة وإن أخذ بدونها صح. (الدر المختار: ٦٠/٥، سعيد)

وفي حاشية ابن عابدين: وأنه (السمك) يملك بالقبض. (فتاوى الشامى: ٦٠/٥، سعيد)

Fatāwā Mahmūdīyyah:

Question: Is there any objection to catch fish and sell it through the boatman?

Answer: It is permissible to remove the fish yourself and sell it to the boatman.[1]

2. This is permissible.

ولو كان يؤخذ بغير حيلة اصطياد جاز. (الهداية: ٥١/٣. وكذا فى الفتاوى الهندية: ١١٣/٣. وكذا فى فتاوى الشامى: ٦٠/٥، سعيد)

3. If it is not possible to catch it easily, it will not be permissible to sell it because you are unable to hand it over to the buyer.

الدر المختار:

وفسد بيع سمك لم يصد أو صيد ثم ألقي في مكان لا يؤخذ منه إلا بحيلة. وفى الشامية: قوله فلو سده ملكه أى فيصح بيعه إن أمكن أخذه بلا حيلة وإلا فلا، لعدم القدرة على التسليم. (الدر المختار مع رد المحتار: ٦٠/٥، مطلب فى البيع الفاسد، سعيد)

وفى رد المحتار: او بحيلة لم يجز لانه وان كان مملوكاً فليس مقدور التسليم. (رد المحتار: ٦١/٥، مطلب فى البيع الفاسد، سعيد)

[1] *Fatāwā Mahmūdīyyah*, vol. 24, p 33.

الهداية:

ولا في حظيرة إذا كان لا يؤخذ إلا بصيده لأنه غير مقدور التسليم. (الهداية: ٥١/٣)

4. For you to sell an item, two conditions have to be met. (2) The item which is to be sold must be in your ownership. (2) It must be possible for you to hand it over to the buyer.

Jadīd Fiqhī Masā'il:

There are three ways in which a person can be an owner of the fish:

1. A person dug a pond specifically for fish, and fish came into it.
2. The land was not prepared for this purpose, but after water flowed into a place and fish came with it, the person sealed off the exit.
3. A person personally introduces fish into a pond so that they may multiply and grow.

In each of the above cases, we will say that the owner is able to hand over the fish. He will be able to acquire them without having to fish them.[1]

In the case where there are some people who have control over the pond – if they choose any one of the above three ways, they will be the owners of the fish and it will be permissible to buy from them.

Jadīd Fiqhī Masā'il:

It is not permissible to buy or sell fish which are present in a pond and have not been removed from the pond as yet. It will be permissible if they are in such large numbers that there is no need to fish them.[2]

5. If arrangements were made to cause water to flow into a pond with the purpose of obtaining fish from it, and the exit is sealed off after the fish come into it, then the fish will belong to the person who made these arrangements. If it is easy to obtain the fish, it will be permissible to trade in them.

[1] *Jadīd Fiqhī Masā'il*, vol. 4, p. 306.

[2] *Jadīd Fiqhī Masā'il*, vol. 4, p. 316.

وإن لم يكن أعدها لذلك لا يملك ما يدخل فيها فلا يجوز بيعه لعدم الملك إلا أن يسد الحظيرة إذا دخل فحينئذٍ يملكه ثم ينظر إن كان يؤخذ بلا حيلة جاز بيعه وإلا لا يجوز. (فتح القدير: ٤١٠/٦، دار الفكر، وكذا فى فتاوى الشامى: ٦١/٥، سعيد)

Further reading: *Imdād al-Fatāwā*, vol. 3, pp. 46-50; *Ahsan al-Fatāwā*, vol. 6, p. 480; *Imdād al-Ahkām*, vol. 3, p. 365; *Jadīd Fiqhī Masā'il*, vol. 4, pp. 301-316.

Allāh taʿālā knows best.

Accumulating items which are fundamentally ownerless

Question

A person goes to the mountains near where he lives, chops off trees, and sells them. Is this permissible? What if the municipality or government prohibits chopping trees from that area, and the person still chops them?

Answer

It is permissible to accumulate items which are fundamentally ownerless and to sell them after that. It is therefore permissible to chop off trees from mountains and sell them. However, if the government or municipality has prohibited this action, it will be unlawful to chop them if there is a sound reason behind the prohibition. For example, if people are not prohibited from chopping off trees, all the trees of the mountains and jungles will cease to exist. There are many benefits in allowing them to exist. Rasūlullāh sallallāhu ʿalayhi wa sallam prohibited the chopping of trees of Madīnah to preserve the beauty of the city.

شرح المجلة:

يسوغ الاحتطاب من أشجار الجبال المباحة لكل أحد كايناً من كان وبمجرد الاحتطاب يعني بجمعها يصير مالكاً لها والربط ليس بشرط. عبارة الهندية: عن القنية: المحتطب يملك الحطب بنفس الاحتطاب ولا يحتاج إلى أن يشده

ويجمعه حتى يثبت له الملک. (شرح المجلة لمحمد خالد الاتاسی، ١٨٨/٤، فصل فی بیان کیفیة استملاک الاشیاء المباحة)

<u>فتاوی الشامی:</u>

والحطب في ملک رجل ليس لأحد أن يحتطبه بغير إذنه، وإن كان غير ملک فلا بأس به، ولا يضر نسبته إلى قرية أو جماعة ما لم يعلم أن ذلک ملک لهم... ويملک المحتطب الحطب بمجرد الاحتطاب وإن لم يشده ولم يجمعه. (فتاوی الشامی: ٤٤٠/٦، فصل الشرب، سعيد)

وللاستزادة: انظر: (البحر الرائق: ١٨٣/٥، فصل فی الشرکة الفاسدة، کوئته. والمبسوط للامام السرخسی: ١٥٣/٩)

'Itr Hidāyah:

Mubāh Aslī: (fundamentally ownerless) This refers to what Allāh's general divinity and perfect mercy created for the benefit of the creation as a whole, so that the weak and strong, the rich and poor - in fact, even animals and birds - can derive benefit from those things. These permissible items are enough for people of intelligence to earn and to save themselves from calamities. For example, rivers, jungles, mountains; and from these three, the meat of lawful animals, their skins, and rain water. These are lawful and permissible to everyone. They are sufficient to provide for man's food, clothing and shelter.

Every ownerless thing comes into the ownership of a person once he takes possession of it. It will not leave his ownership as long as it is not removed legally from his ownership. Therefore, pearls, corals, gems, wood, flowers, fruit, grass, water, animals, fish, pebbles, rocks, and all metals [like gold and silver] will come into the ownership of a person once he takes possession of them. Before they go into a person's ownership, every other person has the right to take possession of them.

It is not permissible for the government to take control of ownerless things and to try to obliterate Allāh's wisdom in this way...However, for administrative purposes, it will be permissible for the government to seal off a road, mow down a jungle, to see to the growing of grass of

a certain jungle, and to prevent others from interfering in these matters.[1]

عن عامر بن سعيد عن أبيه قال: قال رسول الله صلى الله عليه وسلم: إني أحرم ما بين لابتي المدين أن يقطع عضاها أو يقتل صيدها. (مسلم شريف: ٤٤٠/١)

<u>شرح معانى الآثار:</u>

عن نافع عن ابن عمر رضي الله عنه قال: نهى رسول الله صلى الله عليه وسلم عن آطام المدينة أن تهدم وقال: إنها من زينة المدينة. (شرح معانى الآثار: ١٩٣/٤، ١٩٤، باب صيد المدينة، بيروت)

قال الطحاوي: يحتمل أن يكون سبب النهي عن صيد المدينة وقطع شجرها كون الهجرة إليها واجبة فكان يفعله بقاءا لزينتها ليتطيبوها ويألفوها لأن بقاء ذلك مما يزيد في زينتها ويدعو اليها كما روي عن ابن عمر رضي الله عنه نهى عن هدم آطام المدينة فإنها من زينتها. (مرقات: ٢٠/٦. وتحفة الاحوذى: ٢٩٢/١٠، باب فى فضل المدينة. وفتح البارى ٨٣/٤، باب حرم المدينة. والتمهيد لابن عبد البر: ٣١٠/٦)

We learn from the above Aḫādīth and their explanations that the leader of the Muslims or the supervisor of a certain area can prohibit the chopping off of trees if it is based on sound reason.

Allāh taʿālā knows best.

Selling items which are used in an idolater's place of worship

<u>Question</u>

An idolater wants to buy items for use in his place of worship. Is it permissible to sell them to him?

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[1] *ʿItr Hidāyah*, p. 313, 315, 316.

Answer

Imām Abū Hanīfah rahimahullāh is of the view that it is permissible. Imām Muhammad and Imām Abū Yūsuf rahimahumallāh are of the view that it is impermissible. It is therefore better to abstain. But if someone does, his income will be lawful.

الدر المختار:

قلت: وقدمنا ثمة معزياً للنهر أن ما قامت المعصية بعينه يكره بيعه تحريماً وإلا فتنزيهاً فليحفظ توفيقاً، وجاز تعمير كنيسة... وقالا: لا ينبغي ذلك لأنه إعانة على المعصية وبه قالت الثلاثة، زيلعي. وفى الشامية: قوله وجاز تعمير كنيسة، قال فى الخانية: ولو آجر نفسه ليعمل فى الكنيسة ويعمرها لا بأس به لأنه لا معصية في عين العمل. (الدر المختار مع رد المحتار: ٣٩١/٦، فصل فى البيع، سعيد)

الفتاوى الهندية:

ولو استاجر الذمي مسلماً ليبني له بيعة أو كنيسة جاز ويطيب له الأجر كذا فى المحيط. (الفتاوى الهندية: ٤٥٠/٤)

Imdād al-Fatāwā:

Question: A polytheist buys items for the construction of his temple or for the worship of his idols from a Muslim, or hires a Muslim to do the job; is it permissible to sell him those items? Is it permissible to take a wage from him?

Answer: Imām Abū Hanīfah rahimahullāh is of the view that it is permissible. Imām Muhammad and Imām Abū Yūsuf rahimahumallāh are of the view that it is impermissible. It is therefore better to abstain. If a poor Muslim does such a job, he should not be reprimanded.[1]

Muftī Muhammad Shafī' Sāhib rahimahullāh has explained the concept of "assisting in evil" in some detail. The gist of it is quoted from *Jawāhir al-Fiqh*:

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[1] *Imdād al-Fatāwā*, vol. 3, p. 111.

ثم السبب على قسمين قريب وبعيد ثم القريب على قسمين: سبب محرك للمعصية بحيث لو لاه لما أقدم الفاعل على ہذه للمعصية كسب آلہة الكفار بحيث يكون سبباً مفضياً لسب الله سبحانہ وتعالیٰ ومثلہ نہی أمہات المؤمنين عن الخضوع فی الكلام للاجانب ...وسبب ليس كذلک ولكنہ يعين لمريد المعصية ويوصلہ إلی ما يہواه كإحضار الخمر لمن يريد شربہ... فالقسم الأول من السبب القريب حرام بنص القرآن ...والقسم الثاني من السبب القريب أعني ما لم يكن محركاً وباعثاً بل موصلاً محضاً فحرمتہ و إن لم تكن منصوصة ولكنہ داخل فيہ باشتراک العلة وہی الإفضاء إلی الشر والمعصية ولہذا أطلق الفقہاء عليہا لفظ كراہة التحريم لا الحرمة... وأما السبب البعيد كبيع الحديد من أہل الفتنة... وبيع الآجر والحطب ممن يتخذہا كنيسة أو بيعة... إذا علم فتكره تنزيہاً. (جواہر الفقہ: ٢/٤٤٩-٤٥٢، اقسام السبب واحكامہ، مكتبہ دار العلوم كراچی)

The summary of the above is that there are three types of causes, and all are not prohibited. Rather:

1. *Sabab Qarīb Muharrik* – e.g. speaking bad about false gods. It is harām to do this as per the explicit texts of the Qur’ān.
2. *Sabab Qarīb Ghayr Muharrik* – e.g. selling arms and ammunition to those who spread corruption. It is makrūh tahrīmī to do this.
3. *Sabab Baʿīd* - -e.g. selling debris to non-Muslims for the construction of their place of worship. It is makrūh tanzīhī to do this.

Allāh taʿālā knows best.

When goods are destroyed while in transit

Question

Zayd bought a large amount of goods from ʿAmr and asked him to give them over to a trucking company. ʿAmr did as requested. While the goods were being transported, some thieves stole the goods. Is it

obligatory on the seller to pay for the goods, or is it the responsibility of the buyer?

Answer

In the Sharī'ah, responsibility does not shift with the mere conclusion of the transaction and establishment of ownership. As long as the buyer does not take possession of the goods, they will be considered to be owned by the seller. The reality and form of taking possession is not laid down in the Qur'ān and Hadīth. It is based on societal norms. In the case where the goods are destroyed, the seller will be responsible. Yes, if possession was realized on the basis of societal norms, and then they are destroyed, the buyer will be responsible.

In this case, the action of despatching the goods was done on the order of the buyer, and he also paid for the transportation. This will be understood as taking possession on the basis of societal norms. If the goods are destroyed, the buyer will be responsible. If the buyer had given the order to send and despatch the goods, but the transportation costs were paid by the seller, then even in this case, possession will be realized and the buyer will be responsible in the case where they are destroyed. If the seller sent the goods without the buyer's instruction and without the latter paying for the transportation costs, then the seller will be responsible if the goods are destroyed. This is because taking possession of the goods was not realized.

رد المحتار:

وحاصله أن التخلية قبض حكماً لو مع القدرة عليه بلا كلفة لكن ذلك يختلف بحسب حال المبيع،... قال أجمعوا على أن التخلية فى البيع الجائز تكون قبضاً... اشترى وعاء لبن خاثر فى السوق فأمر البائع بنقله إلى منزله فسقط فى الطريق فعلى البائع إن لم يقبضه المشتري،... إلا أن يقول (المشترى): ادفعه إلى الغلام لأنه توكيل للغلام والدفع إليه كالدفع إلى المشتري. (رد المحتار: ٥٦٢/٤، ٥٦٣، مطلب فى شروط التخلية، سعيد. وكذا فى الفتاوى البزازية على هامش الهندية: ٤٩٩/٤. والفتاوى الهندية: ١٩/٣)

بدائع الصنائع:

ولا يشترط القبض بالبراجم، لأن معنى القبض هو التمكين والتخلي وارتفاع الموانع عرفاً وعادةً حقيقةً. (بدائع الصنائع: ١٤٨/٥، سعيد)

وفيه أيضاً: وكذلك لو فعل البائع شيئاً من ذلك بأمر المشترى لأن فعله بأمر المشتري بمنزلة فعل المشتري بنفسه. (بدائع الصنائع: ٢٤٦/٥)

المغني:

لأن القبض مطلق فى الشرع فيجب الرجوع فيه إلى العرف. (المغنى لابن قدامة الحنبلى، ٢٢٠/٤)

ʿIṯr Hidāyah:

When goods are sent by rail or the post office, they are considered to be in the possession of the buyer the moment they are despatched. If the buyer stated that the goods must be sent by rail or post office, and the owner did as told, and the goods are destroyed along the way, then the seller will not be responsible. This is because the seller handed the goods over to the representative (rail or post office) of the buyer. If the buyer did not ask for the goods to be sent, and the seller sent them on his own accord, then parcelling and dispatching the goods is not considered to be possession by the buyer. If they are destroyed before they reach the buyer, he will not be responsible.

وللاستزادة انظر: (شرح المجلة لمحمد خالد الاتاسى: ٢٠٢/٢، ٢٠٤. واسلام اور جديد معاشى مسائل: ٢٠٠/٤، ٢٠٤. وجديد فقهى مسائل: ١٩٦/٤، ٢٠٠. وجديد فقهى مباحث: ١٢/١٥-١٦، ٨٧، ١٠٩، ١٢١، ٢٥٤)

Allāh taʿālā knows best.

When a seller buys an item at a lower price from a buyer

<u>Question</u>

A person buys tiles, and sometimes he buys more than what was needed. He then wants to return the extra tiles. The seller tells him that he will pay him 20% less than what he had paid for those tiles. Is

this permissible? Is there any leeway to make it permissible? Is this included in the principle of (شراء ما باع بأقل مما باع) buying an item at a price which is lower than what the seller had sold it for? The following is stated in *I'lā' as-Sunan*:

إن كان البيع الأول مشروطاً بالبيع الثاني فهو غير جائز أيضاً لعدم جواز البيعتين في بيعة وإن لم يكن مشروطاً فهو مكروه لأنه مضطر... الخ. (اعلاء السنن: ١٤/١٧٨)

The author says that the basis for it being makrūh is that it is a *bay' mudtarr* (a forced transaction). Is it really so?

Answer

In the first transaction, the seller had taken possession of the entire amount of money. He then bought the item from the buyer at a lesser price. This is permissible without any reprehensibility. As for (شراء ما باع بأقل مما باع) which is prohibited by the jurists, it is because the person is profiting from what is not pledged before the first amount could be paid. This is not the case in the present question. As for the quotation from *I'lā' as-Sunan* it is related to *bay' 'aynah* which is then connected to the one giving a loan and the one asking for a loan. The present scenario is different from it.

وفسد شراء ما باع بنفسه أو بوكيله من الذي اشتراه ولو حكماً كوارثه بالأقل من قدر الثمن الأول قبل نقد كل الثمن الأول... ولا بد لعدم الجواز من اتحاد جنس الثمن وكون المبيع بحاله فإن اختلف جنس الثمن أو تعيب المبيع جاز مطلقاً كما لو شراه بأزيد أو بعد النقد. وفى الشامية: قوله قبل نقد كل الثمن الأول. قيد به لأن بعده لا فساد، ولا يجوز قبل النقد وإن بقي درهم... والحاصل أن نقد كل الثمن شرط لصحة الشراء لا لفساده لأنه يفسد قبل نقد الكل أو البعض، فتأمل. (الدر المختار مع رد المحتار: ٥/٧٣، ٧٤، سعيد)

وفي فتح القدير: وقيد بقوله قبل نقد الثمن لأن ما بعده يجوز بالإجماع بأقل من الثمن. (فتح القدير: ٦/٤٣٣، دار الفكر)

Furthermore, *I'lā' as-Sunan* states that the *bay' 'aynah* is a *bay' mudtarr.* The author then gives the reason for this:

لأن المشتري لا حاجة له فى الحريرة وإنما حاجته فى الدراهم، والبائع لا يرضى بالإقراض، وإنما يرضى بالبيع كذلک، فهو مضطر إلى الشراء فيكون مكروهاً، والوجه فيه أن فيه بخلاً مذموماً وتركاً للمبرة والإحسان الذين هما من مكارم الأخلاق. (اعلاء السنن: ١٧٨/١٤)

وللاستزادة انظر: (فتح باب العناية فى شرح كتاب النقاية: ٢٤٢/٣، بيروت. بيوع العينة والآجال، من منشورات مدرسة عائشة الصديقة للبنات، كراتشى، باكستان. وجديد معاملات كے شرعى احكام: ٥٧/١)

Allāh ta'ālā knows best.

Selling goods to one who trades in alcohol

Question

A Muslim trades in nothing but alcohol. This is his means of income. Is it permissible to sell goods to him?

Answer

If he sells the alcohol for the consumption of alcoholics, his income is impermissible. No goods should be sold to him. If he sells the alcohol out of necessity, e.g. the alcohol is used as an ingredient in medicines and colorants, then you may sell goods to such a person. Yes, if the alcohol is from the four prohibited alcohols – i.e. alcohol from ripe or unripe grapes, alcohol made from dates, alcohol made from raisins – then there is no leeway for trading in them. It is also not permissible to sell goods to this person.

فتاوى الشامى:

وسقط تقومها في حق المسلم حتى لا يضمنها متلفها وغاصبها ولا يجوز بيعها، لأن الله تعالىٰ لما نجسها فقد أهانها، والتقوم يشعر بعزتها، وقال عليه الصلاة والسلام: "إن الذي حرم شربها حرم بيعها وأكل ثمنا." (فتاوى الشامى: ٤٤٩/٦، كتاب الاشربة، سعيد)

وفي رد المختار: قوله وصح بيع غير الخمر أى عنده خلافاً لهما فى البيع والضمان، لكن الفتوىٰ على قوله فى البيع، وعلى قولهما فى الضمان. (فتاوى الشامى: ٤٥٤/٦، كتاب الاشربة، سعيد)

والقسم الثالث: الأشربة المسكرة الأخرى، غير الأقسام الأربعة المذكورة، مثل نبيذ التمر أو الزبيب المطبوخ أدنى طبخة، أو عصير العنب المطبوخ الذي ذهب ثلثاه، وكذلك نبيذ العسل، والتين، والحنطة، والشعير، والحبوب الأخرى، وحكم هذا القسم عند أبي حنيفة وأبي يوسف: أنه لا يحرم منه شرب القليل الذي لا يسكر، وإنما يحرم منه القدر المسكر... وأفتى كثير من الحنفية بقول الجمهور في حق الحرمة، وبقول أبي حنيفة في جواز بيع غير الخمر وعدم وجوب الحد منه إلا إذا أسكر، وقد صرح ابن عابدين فى الأشربة من رد المحتار: ٣٢٣/٥، بأن الفتوىٰ على قول أبي حنيفة في جواز البيع مع الكراهة والظاهر أن الكراهة إنما تثبت إذا تعاطاه الرجل لغرض غير مشروع، وأما إذا تعاطاه لغرض مشروع، كالدواء والضماد وغيره فيما يجوز استعماله فيه، فالظاهر انتفاء الكراهة حينئذٍ... وبهذا يتبين حكم الكحول المسكرة (ALCOHOLS) التي عمت بها البلوى اليوم، فإنها تستعمل في كثير من الأدوية والعطور والمركبات الأخرى، فإنها إن اتخذت من العنب أو التمر فلا سبيل إلى حلتها أو طهارتها، وإن اتخذت من غيرهما فالأمر فيها سهل على مذهب أبي حنيفة، ولا يحرم استعمالها للتداوي أو لأغراض مباحة أخرى ما لم تبلغ حد الإسكار، لأنها إنما تستعمل مركبة مع المواد الأخرى، ولا يحكم بنجاسها أخذاً بقول أبي حنيفة، وإن معظم الكحول التي تستعمل اليوم فى الأدوية والعطور وغيرها لا تتخذ من العنب أو التمر، إنما تتخذ من الحبوب أو القشور أو البترول وغيره، وحينئذٍ هناك فسحة فى الأخذ بقول أبي حنيفة عند عموم

البلوىٰ، والله سبحانه أعلم. (تكملة فتح الملهم: ٣/٦٠٠، ٦٠٨، كتاب الاشربة، مكتبة دار العلوم كراتشى)

Fatāwā Haqqānīyyah:

Imām Abū Hanīfah rahimahullāh is of the view that apart from the four alcohols [mentioned above], if an alcohol is made from grains or other items, then it is permissible to use it at the time of compulsion which is recognized as such by the Sharīʿah. There is also room for trading in it. Present day alcohol (which is also a type of alcohol which is consumed) made from petrol, barley, maize, etc. and used – at the time of necessity – for many medicines, colorants, other chemicals, etc. may be bought and sold as per the view of Imām Abū Hanīfah rahimahullāh. In today's times, the verdict is issued on this view on the basis of general necessity (*ʿumūm balwā*).[1]

Allāh taʿālā knows best.

Trading in fruit

Question

Several ways of buying fruit orchards are in vogue here. Which of them are permissible and which are not:

1. The fruit is bought after it ripens, but it is not harvested immediately. Instead, the buyer will break them periodically. After the transaction is completed, a promise is made that the fruit will be left on the trees for a month or two.
2. A condition is made in the transaction itself that the fruit will be left on the trees for some time.
3. The condition is not made before the transaction nor after it, but the fruit is left on the trees on the basis of societal norms.
4. Some of the fruit is ripe while some is not, or all of it is unripe. The transaction is concluded on the condition that it will remain on the tree.
5. The fruit has not appeared on the tree as yet; only the flowers have appeared. The flowers are sold to the buyer.

We will appreciate it if any additional advice is given to us.

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[1] *Fatāwā Haqqānīyyah*, vol. 6, p. 103.

Answer

The first four scenarios of selling the fruit are permissible. The fifth scenario where no fruit has appeared as yet, and only flowers have appeared, is impermissible. This is because it is classified as bayʿ al-maʿdūm (sale of an item which does not exist). People don't normally sell when only flowers have appeared on the trees. The transaction is executed after the appearance of the fruit.

فتح القدير:

لا خلاف في عدم جواز بيع الثمار قبل أن تظهر، ولا في عدم جوازه بعد الظهور قبل بدو الصلاح بشرط الترک، ولا في جوازه قبل بدو الصلاح بشرط القطع فيما ينتفع به، ولا فى الجواز بعد بدو الصلاح... والخلاف إنما هو في بيعها قبل بدو الصلاح على الخلاف في معناه، لا بشرط القطع، فعند مالک والشافعي وأحمد لا يجوز وعندنا إن كان بحال لا ينتفع به فى الأكل ولا في علف الدواب خلاف بين المشايخ قيل لا يجوز ونسبه قاضيخان لعامة مشايخنا، والصحيح أنه يجوز لأنه مال منتفع به في ثانى الحال إن لم يكن منتفعاً به فى الحال وقد أشار محمد في كتاب الزكاة إلى جوازه... وإن كان بحيث ينتفع به ولو علفاً للدواب فالبيع جائز باتفاق أهل المذهب إذا باع بشرط القطع أو مطلقاً... فإن باعه بشرط الترک فإن لم يكن تناهى عظمه فالبيع فاسد عند الكل وإن كان قد تناهى عظمه فهو فاسد عند أبي حنيفة وأبي يوسف، وهو القياس، ويجوز عند محمد استحساناً، وهو قول الأئمة الثلاثة، واختاره الطحاوي لعموم البلوىٰ... وجه قول محمد فى المتناهى الاستحسان بالتعامل لأنهم تعارفوا التعامل... ومحمد يقول بمنعه فيه (أى فيما لم يتناه عظمه) لما فيه من اشتراط الجزء المعدوم وهو الأجزاء التي تزيد بمعنى من الأرض والشجر إلى أن يتناهى العظم، ولا يخفى أن الوجه لا يتم فى الفرق لمحمد إلا بادعاء عدم العرف فيما لم يتناه عظمه اذ القياس عدم الصحة للشرط الذي لا يقتضيه العقد فى المتناهى وغيره خرج منه المتناهى للتعامل،

فكون ما لم يتناه على أصل القياس إنما يكون لعدم التعامل فيه. (فتح القدير: ٢٨٧/٦، ٢٨٨، دار الفكر)

تكملة فتح الملهم:

قال العبد الضعيف عفا الله عنه، ويظهر من كلام ابن همام فى الفتح أن العرف إذا جرى ببيع الثمار بعد بدو صلاحها بشرط الترک واشتدت إليه الحاجة كان قياس قول محمد الجواز وإن لم يتناه عظم الثمار، لأنه أجاز شرط الترک بعد ما تناهى عظمها للعرف و الضرورة، قلت: وكذلک أجاز محمد بيع الثمار في حين ظهر بعضها ولم يظهر بعضها للضرورة والعرف... فكان قياس قول محمد الجواز عند الضرورة وإن لم يتناه عظمها. (تكملة فتح الملهم: ٣٩٥/١)

شرح المجلة:

فقد اتضح مما ذكرناه وضوح الشمس بحيث لم يبق ريب ولا لبس أنه لو جرى التعامل المستفيض في بيع الثمار قبل بدو صلاحها بشرط تركها حتى تنضج، يصح البيع عند محمد... فاشتراط ترک الثمار البارزة حتى تنضج وإن كان شرطاً لا يقتضيه العقد ولا يلائمه وفيه نفع لأحد المتعاقدين لكن حيث جرى به العرف الشايع في بلادنا واستفاض بين الخاص والعام، فيكون معتبراً... وعليه يكون صحة بيع الثمار البارزة بشرط تركها حتى تنضج اتفاقية، فليحفظ هذا فإنه من مفردات هذا الكتاب. (شرح المجلة لمحمد الاتاسى، ٩٥/٢، ٩٦)

وفي فتح القدير: (ولو اثمرت بعد القبض يشتركان فيه للاختلاط) وكان الحلوانى يفتى بجوازه فى الكل، وزعم أنه مروي عن أصحابنا، وكذا حكى عن الأمام الفضلي وكان يقول: الموجود وقت العقد أصل وما يحدث تبع نقله

شمس الأئمة عنه ولم يقيده عنه بكون الموجود وقت العقد يكون أكثر بل قال عنه: اجعل الموجود أصلاً فى العقد وما يحدث بعد ذلك تبعاً. وقال: استحسن فيه لتعامل الناس، فإنهم تعاملوا بيع ثمار الكرم بهذه الصفة، ولهم في ذلك عادة ظاهرة وفي نزع الناس من عادتهم حرج، وقد رأيت رواية في نحو هذا عن محمد وهو بيع الورد على الأشجار فإن الورد متلاحق، ثم جوز البيع فى الكل بهذا الطريق وهو قول مالك. (فتح القدير: ٢٩١/٦، دار الفكر)

فتاوى الشامى:

قلت: لكن لا يخفى تحقق الضرورة في زماننا ولا سيما في مثل دمشق الشام كثيرة الأشجار والثمار فإنه لغلبة الجهل على الناس لا يمكن إلزامهم بالتخلص بأحد الطرق المذكورة، وإن أمكن ذلك بالنسبة إلى بعض أفراد الناس لا يمكن بالنسبة إلى عامتهم وفي نزعهم عن عادتهم حرج كما علمت، ويلزم تحريم أكل الثمار في هذه البلدان إذ لا تباع إلا كذلك والنبي صلى الله عليه وسلم إنما رخص فى السلم للضرورة مع أنه بيع المعدوم، فحيث تحققت الضرورة هنا أيضاً أمكن إلحاقه بالسلم بطريق الدلالة، فلم يكن مصادماً للنص، فلذا جعلوه من الاستحسان، لأن القياس عدم الجواز، وظاهر كلام الفتح الميل إلى الجواز ولذا أورد له الرواية عن محمد بل تقدم أن الحلواني رواه عن أصحابنا وما ضاق الأمر إلا اتسع. (فتاوى الشامى: ٥٥٥/٤، مطلب فى بيع الثمر، سعيد)

Further reading: *Ahsan al-Fatāwā*, vol. 6, pp. 489-492; *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 50.

Objection:

If all the forms of trading in fruit were to be made permissible, the import of the Hadīth will no longer remain. A Hadīth states:

نهى رسول الله صلى الله عليه وسلم عن بيع الثمار حتى يبدو صلاحها.

Furthermore, if we are going to pass a ruling based on the mutual dealings of people, it will entail casting aside explicit texts completely. And this is not permissible. A text can be specified on the basis of mutual dealings, but it cannot be discarded completely. What is the answer to this?

Answer:

Imām Tahāwī rahimahullāh gives two answers in his *Sharh Maʿānī al-Āthār*:

(1) The prohibition is taken to mean "counsel" – النهي محمول على المشورة.

The words of Hadrat Zayd ibn Thābit radiyallāhu ʿanhu in *Sahīh Bukhārī* make reference to this:

كالمشورة يشير بها لكثرة خصومتهم.

The Hadīth will mean that this transaction is permissible according to the Sharīʿah, but one is advised not to enter into such a transaction. And it is not obligatory to accept a person's advice; it is recommended.

(2) The prohibition is taken to mean *salm* (handing over the item) – محمول على السلم.

According to the Hanafīs, it is essential for the sale-item to be present from the time of the transaction until it is handed over to the buyer. Therefore, it is prohibited to hand over the fruit before their viability becomes obvious.

Allāh taʿālā knows best.

Imposing an immediate full-payment when a person defaults in paying an instalment

Question

Zayd sells a machine for R200 000 on credit, and lays down the condition that the buyer must pay the amount in instalments over a period of ten months. He must pay R20 000 a month. If he misses a payment in any month, he will have to pay for all the remaining months immediately. Is this agreement permissible?

Answer

It is permissible to lay down the condition of an immediate payment of the full amount in the case where the buyer defaults in paying an instalment. There is nothing wrong in such a condition.

ولو قال كلما دخل نجم ولم تؤد فالمال حال صح ويصير المال حالاً. (خلاصة الفتاویٰ: ۵٤/۳، كتاب البيوع)

(وكذا فى البحر الرائق: ۱۲۲/٦، فصل فى بيان التصرف فى المبيع والثمن، كوئٹہ)

وفى البحر الرائق: قال فى البزازية (على ہامش الہندية: ٤۲٦/٤): وإبطال الأجل يبطل بالشرط الفاسد بأن قال: كلما حل نجم ولم تؤد فالمال حال صح وصار حالاً. وعبارة الخلاصة: وإبطال الأجل يبطل بالشرط الفاسد ولو قال كلما دخل نجم ولم تؤد فالمال حال صح ويصير المال حالاً. فجعلہما مسئلتين وہو الصواب وأما قولہ فى البزازية: بأن قال تصوير للأولى فسہو ظاہر لأنہ لو كان كذلک لبقي الأجل فكيف يقول صح فيلتأمل. (البحر الرائق: ۱۸۷/٦، باب المتفرقات، كوئٹہ)

وأيضاً نقلہ العلامة الشامي عن البحر، وزاد بقولہ: وذكر العلامة المقدسي أن العبارتين مشكلتان، وأن الظاہر أن المراد أن الأجل يبطل، وأنہ إذا علق على شرط فاسد كعدم أداء نجم فى المثال المذكور وحاصلہ أن لفظ إبطال في عبارتي البزازية والخلاصة زائد وأنہ لا مدخل لذكره في ہذا القسم أصلاً. (فتاوى الشامى: ۲٤۸/۵، ما يبطل بالشرط الفاسد، سعيد)

Islām Aur Jadīd Maʿāshī Masā'il:

Where a transaction is concluded on the payment of instalments, some agreements clearly state that if the buyer does not pay a particular instalment by a certain date, then the remaining instalments will have to be paid immediately. It will be permissible for the seller to demand all the remaining instalments.[1]

Allāh taʿālā knows best.

[1] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 3, p. 121.

Trading in blood

Question

Is it permissible to trade in blood?

Answer

Blood is not classified as an item of worth, so it is not permissible to sell it. Yes, in the case where a person is compelled, there is leeway for him to buy it if it cannot be obtained for free. Muslims should establish blood banks and make arrangements for blood to be made available for free so that they can – as far as possible – abstain from buying and selling it.

الهداية:

وإذا كان أحد العوضين أو كلاهما محرماً فالبيع فاسد كالبيع بالميتة والدم. (الهداية: ٤٩/٣، باب البيع الفاسد)

تبيين الحقائق:

لم يجز بيع الميتة والدم والخنزير... لعدم ركن البيع وهو مبادلة المال بالمال وبيع هذه الأشياء باطل. (تبيين الحقائق: ٣٦٢/٤)

الدر المختار:

بطل بيع ما ليس بمال والمال ما يميل إليه الطبع ويجري فيه البخل والمنع فخرج تراب ونحوه كالدم المسفوح. (الدر المختار: ٥٠/٥، سعيد)

Ahsan al-Fatāwā:

It is harām to buy and sell flowing blood.[1]

Jadīd Fiqhī Masā'il:

The 'ulamā' permitted the transfusion of blood at the time of need, but have not permitted its sale.[2]

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[1] *Ahsan al-Fatāwā*, vol. 6, p. 522.

[2] *Jadīd Fiqhī Masā'il*, vol. 1, p. 335.

Imdād al-Ahkām:

These opinions demand that if, at any time, blood takes on a monetary value on the basis of societal norms, then its buying and selling is correct.[1]

Jawāhir al-Fiqh:

It is not permissible to sell blood. However, the situations in which - and based on certain conditions where - it is deemed permissible to give blood to a patient, and it cannot be obtained for free, then it will be permissible to obtain it by paying its price. However, it is not permissible for the one giving the blood to take any money for it.[2]

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

The blood which flows from a halāl animal at the time of its slaughter cannot be bought or sold. If a person sold it, it is not permissible for him to use the money which he received. In the same way, it is harām to sell human blood and to use the money obtained from its sale. However, it is permissible to donate blood. Just as it is permissible to breast-feed the infant of another woman at the time of need, it is permissible to donate blood to save the life of someone. In fact, in some situations it becomes necessary to donate blood.[3]

Further reading: *Jawāhir al-Fiqh*, vol. 7, pp. 44-50.

Allāh taʿālā knows best.

Selling a weighted item by weighing it with its packaging

Question

A person bought 10kg rice or manure which was packed in a box. However, the box weighed one kilo. Is it permissible to sell it like this? After all, the packaging [box] was calculated at the same price as the contents.

Answer

Since the weight which is written on the packaging is not made as a condition, and in most cases the transaction between the two parties [buyer and seller] is happily done as a mutual exchange [money given in exchange for the item], it is permissible to sell it like this.

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[1] *Imdād al-Ahkām,* vol. 3, p. 355.

[2] *Jawāhir al-Fiqh*, vol. 7, p. 47.

[3] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 48.

ينعقد بالتعاطي فى النفيس والخسيس وهو الصحيح لتحقق المراضاة. (الهداية: ١٩/٣)

Ahsan al-Fatāwā:

The buyer and seller are focussed on the box or package, the weight which is written on it is not a condition. This is why it is permissible to trade in it without weighing it.[1]

Fatāwā Mahmūdīyyah:

Question: The shopkeeper weighs sugar into a pouch and gives it to the customer. The pouch has its own value and weight, and the buyer now receives that much less sugar. Is it permissible to deal in this way?

Answer: If the buyer and seller are happy with the transaction, it is permissible.[2]

Mahmūd al-Fatāwā:

Based on societal norms, it will be understood that the weight of the item will be as it is together with the packaging. This is why it is permissible.[3]

Allāh taʿālā knows best.

Buying grave-sheets from a grave-custodian

Question

Some people cover graves with sheets and fabrics. The grave-custodian or trustee then sells the sheets. Is it permissible to buy them?

Answer

It is harām to cover a grave with a sheet or any other item. The grave-custodian does not become its owner. It is therefore not permissible to trade in it. The ownership of the person who buys it will not be established.

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[1] *Ahsan al-Fatāwā*, vol. 6, p. 499.

[2] *Fatāwā Mahmūdīyyah*, vol. 24, p. 40.

[3] *Mahmūd al-Fatāwā*, vol. 2, p. 405.

Yes, if the owner [of the sheet] repented and desisted from his incorrect intention, he may sell it after that if he wants. It will be permissible.

حُرِّمَتْ عَلَيْكُمُ الْمَيْتَةُ وَالدَّمُ وَلَحْمُ الْخِنْزِيْرِ وَمَآ أُهِلَّ لِغَيْرِ اللّٰهِ بِهِ.

> Prohibited to you are dead animals, blood, the flesh of swine, and that on which the name of anyone other than Allāh is invoked.[1]

قوله سبحانه تعالىٰ: "وما أهل به لغير الله" أى ما أعلن به أو نودى عليه بغير اسم الله تعالىٰ وهو مأخوذ من أهل إذا رفع صوته بالكلام فأهل فى الآية مبنى للمجهول، ضمن أهل معنى تقرب فعدى لمتعلقه بالباء وباللام مثل تقرب،... وفائدة هذا التضمين تحريم ما تقرب به لغير الله تعالىٰ. (التحرير والتنوير للعلامة محمد طاهر بن عاشور، ١١٩/٢)

'Itr Hidāyah:

Khulāsah at-Tafāsīr, vol. one, Sūrah al-Mā'idah states: The words *wa mā uhilla* are general. If they are not general in meaning and refer specifically to slaughtering, even then the ruling will be general because of sameness of the cause.[2]

وأما النذر الذي ينذره أكثر العوام على ما هو مشاهد كأن يكون لإنسان غائب أو مريض أو له حاجة ضرورية فيأتي بعض الصلحاء فيجعل ستره على رأسه فيقول يا سيدي فلان إن رد غائبي أو عوفي مريضي أو قضيت حاجتي فلك من الذهب كذا أو من الفضة كذا أو من الطعام كذا أو من الشمع كذا أو من الزيت كذا فهذا النذر باطل بالإجماع لوجوه منها أنه نذر مخلوق والنذر للمخلوق لا يجوز لأنه عبادة والعبادة لا تكون للمخلوق... ومنها إن ظن أن

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[1] Sūrah al-Mā'idah, 5: 3.

[2] *'Itr Hidāyah*, p. 474.

الميت يتصرف فى الأمور دون الله تعالىٰ واعتقاده ذلك كفر... ولا تشتغل الذمة به ولأنه حرام بل سحت ولا يجوز لخادم الشيخ أخذه ولا أكله ولا التصرف فيه بوجه من الوجوه... فإذا علمت ہذا فما يؤخذ من الدراہم والشمع والزيت وغيرہا وينقل إلى ضرائح الأولياء تقرباً إليهم فحرام بإجماع المسلمين ما لم يقصدوا بصرفها للفقراء الأحياء قولاً واحداً. (البحر الرائق: ٢/٢٩٨، كوئته. وكذا فى حاشية الطحطاوى على مراقى الفلاح، ص ٦٩٣. والدر المختار مع رد المحتار: ٢/٤٣٩، سعيد)

وفى الدر المختار: الحرمة تتعدد مع العلم بها. (الدر المختار: ٥/٩٨، سعيد)

وفي رد المحتار: (تتمة) فى الأحكام عن الحجة: تكره الستور على القبور. (فتاوى الشامى: ٢/٢٣٨، سعيد)

Kifāyatul Muftī:

It is not permissible to place flowers over a grave, light a lamp on it, or to cover it with a sheet.[1]

Ahsan al-Fatāwā:

Even a non-animal which is vowed for anyone apart from Allāh taʿālā is harām because it is vowed for the sake of gaining closeness to someone other than Allāh taʿālā, and is included under the prohibition of *mā uhilla bihi li gharillāh* - that on which the name of anyone other than Allāh is invoked. In other words, the prohibition of an animal is directly proven from a text [Qur'ān], and the prohibition of a non-animal is proven by a text via analogical reasoning (qiyās).[2]

Imdād al-Fatāwā:

Question:

Is it lawful to eat a stallion. Since there is difference of opinion between the Muqallids and Ghayr Muqallids, please provide a detailed

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1 *Kifāyatul Muftī*, vol. 1, p. 347. Also: *Fatāwā Dār al-ʿUlūm Deoband* (Muftī Muhammad Shafīʿ Sāhib), vol. 2, p. 166.

2 *Ahsan al-Fatāwā*, vol. 5, p. 491; *Imdād al-Fatāwā*, vol. 2, p. 554; Muftī Muhammad Shafīʿ: *Maʿārif al-Qur'ān*, vol. 1, p. 424.

answer. Refer to *Tafsīr Ahmadī* of Mullā Jiyūn. What is the meaning of the verse:

وما جعل الله من بحيرة ولا سائبة...

Answer: There are some details in this regard.

1. A person dedicates an animal in the name of someone other than Allāh, and he slaughters it with the same intention. Even if he said "Bismillāh" at the time of slaughtering it, the animal is harām. Its impermissibility is stated in the Qur'ān, and the books of jurisprudence such as *ad-Durr al-Mukhtār* clearly state this.

2. A person merely takes the name of someone other than Allāh, and he has no intention of gaining proximity and approval of the one whose name he took. For example, a Hadīth states that when a person makes an ʿaqīqah, he says: "This is the ʿaqīqah of so and so...". This is undoubtedly halāl. This is what the author of *Tafsīr Ahmadī* refers to as halāl. What he considers unlawful is testimony to this fact.

3. A person dedicates an animal with a corrupt intention and belief. The ruler – for whatever reason – got hold of that animal and auctioned it. Someone bought it and slaughtered it. This animal is halāl because once the ruler takes possession of such an animal, it comes under his ownership. Since the first person is no longer its owner, the corrupt intention which he made is not worthy of consideration.

4. A person dedicates an animal with a corrupt intention. Another person steals it and slaughters it secretly. This animal is harām for two reasons: (1) The corrupt intention of the owner. By dedicating it with a corrupt intention, it does not leave his ownership. (2) Because it is a stolen item.

5. The owner repented from his corrupt intention and slaughtered the animal. It is halāl because the basis for its prohibition no longer exists.

As for the meaning of the verse in the question, it is a denunciation of the action which had been alleged by the unbelievers, viz. they believed that it was unlawful to derive any benefit from such an animal because of its sanctity. Allāh taʿālā knows best.[1]

[1] *Imdād al-Fatāwā*, vol. 4, p. 99.

Imdād al-Fatāwā:

Dedicating an animal in the name of someone other than Allāh causes it to become unlawful similar to carrion. Just as it is not permissible to buy carrion, the same rule applies here.[1]

Allāh taʿālā knows best.

Buying and selling bells

Question

Some people tie a bell around an animal's neck. Is it permissible to sell such a bell?

Answer

The 'ulamā' state that if the bell is tied around an animal for the correct purpose, it will be permissible to do this. In the same way, it is permissible to use a bell for correct purposes. For example, the Islamic madāris may use a bell to indicate the beginning of class times, change of periods, etc. This is included as a correct purpose. The same can be said about sound systems in masājid – they are used solely to amplify and convey a sound. Bearing the above in mind, it will be correct to trade in bells.

As for the prohibition mentioned in the Hadīth, the 'ulamā' have given several explanations for it.

عن أبي هريرة رضي الله عنه قال: إن رسول الله صلى الله عليه وسلم قال: لا تصحب الملائكة رفقة فيها كلب ولا جرس. وفي رواية له عن أبي هريرة رضي الله عنه أن رسول الله صلى الله عليه وسلم قال: الجرس مزامير الشيطان. (رواهما مسلم: ٢/٢٠٢)

Muftī Taqī 'Uthmānī Sāhib writes:

وقال شيخ مشايخنا السهارنبورى فى بذل المجهود: (١٢/٥٣) وهذا (أى كراهة الكلب والجرس) إذا خليا عن المنفعة وأما ما احتيج إليه منهما فمرخص فيه." والذي يظهر لهذا العبد الضعيف عفا الله عنه أن الكراهة المذكورة فى الحديث

[1] *Imdād al-Fatāwā*, vol. 2, p. 562; *Fatāwā Mahmūdīyyah*, vol. 16, p. 70.

إنما تنصرف إلى كلب وجرس قصد منهما اللهو والغنا كماكان يعتاده بعض أهل القوافل ويدل عليه قوله عليه الصلاة والسلام فى الرواية الآتية: "الجرس مزامير الشيطان." أما الكلب إذا كان للحراسة والتحرز من اللصوص فهو مرخص فيه ككلب زرع وماشية وكذلک الجرس إذا كان لمقصود مباح فلا بأس به. (تكملة فتح الملهم: ٤/١٧٩)

الفتاوى الهندية:

اختلف العلماء في كراهة تعليق الجرس على الدواب فمنهم من قال بكراهته فى الأسفار كلها الغزو وغيره في ذلک سواء. قال محمد: فأما ما كان فيه منفعة لصاحب الراحلة فلا بأس به، قال وفى الجرس منافع جمة منها: إذا ضل واحد من القافلة يلحق بها بصوت الجرس ومنها: أن صوت الجرس يبعد هوام الليل عن القافلة كالذئب وغيره ومنها: أن صوت الجرس يزيد في نشاط الدواب فهو نظير الحداء كذا فى المحيط. (الفتاوى الهندية: ٥/٣٥٤)

نفع المفتى والسائل:

وفى الجرس منافع:

منها: إذا ضل واحد من القافلة يلتحق بصوت الجرس.

ومنها: أن صوت الجرس يبعد هوام الليل.

ومنها: أنه يزيد في نشاط الدواب. كذا فى "متفرقات استحسان المحيط"

وان جعل الأجراس في غير الإبل، والحمار الذى يحمل عليه الأثقال لا أحب أن يفعل ذلک؛ لمكان النهى.

سئل على بن أحمد عن القلادة التى فيها الأجراس تجعل على عنق الفرس، هل يجوز، كما هو العادة فى بلادنا؟

قال: نعم؛كذا أجاب أبو حامد. (نفع المفتى والسائل، (فتاوى اللكنوى) ص ٤٩١، ٤٩٢، بيروت)

Imdād al-Fatāwā:

If a bell, rattle, etc. is used to display one's authority and status, it is impermissible. If a bell is tied around an animal to help it to remain energetic or as an announcement to oncoming people so that they may make way for it, then it is permissible.[1]

Allāh taʿālā knows best.

Crops of a land which has been sold

Question

Zayd sold a piece of land which has crops to Khālid. To whom will the crops belong; to the buyer or the seller?

Answer

If, at the time of the transaction, Zayd also made mention of the crops, then the land and the crops will go to the buyer. But if he did not make any mention of the crops, they will remain in the ownership of the seller. He will harvest them immediately, unless he rents the land from the buyer until the crops mature.

الهداية:

ولا يدخل الزرع في بيع الأرض إلا بالتسمية لأنه متصل به للفصل فشابه المتاع الذي فيه... ويقال للبائع اقطعها وسلم المبيع وكذا إذا كان فيها زرع لأن ملك المشتري مشغول بملك البائع فكان عليه تفريغه وتسليمه كما إذا كان فيه متاع. (الهداية: ٢٥/٣، كتاب البيوع)

الفتاوى الهندية:

والزرع والثمر لا يدخلان فى البيع استحساناً إلا أن يشترط المبتاع. (الفتاوى الهندية: ٣٣/٣، كتاب البيوع. والهداية: ٢٥/٣)

[1] *Imdād al-Fatāwā*, vol. 3, p. 110.

وكذا فى بدائع الصنائع: ١٦٤/٥، سعيد. وفتح القدير: ٤٨٦/٥، دار الفكر. وتبيين الحقائق: ١١/٤، ملتان)

النهر الفائق:

باع أرضاً بدون الزرع فهو للبائع بأجر مثلها، استشكله بأن يجب على البائع قطعه وتسليمه الأرض فارغة، وجوابه أنه محمول على ما إذا كان برضى المشتري. (النهر الفائق: ٣٥٨/٣، كتاب البيوع)

وفي رد المحتار: قوله ويؤمر البائع بقطعها، أى فيما إذا باع أرضاً فيها زرع أو شجر عليه ثمر لم يشترطه حتى بقى الزرع والثمرعلى ملك البائع... لأن ملك المشتري مشغول بملك البائع فيجبر على تسليمه فارغاً... قوله وما فى الفصولين باع أرضاً بدون الزرع فهو للبائع بأجر مثلها محمول على ما إذا رضى المشتري أى رضي بإبقاء الزرع بأجر مثل الأرض وإلا أمر البائع بالقلع توفيقاً بين كلامهم. (رد المحتار: ٥٥٤/٤، كتاب البيوع، سعيد)

وفى "الفقه الحنفى في ثوبه الجديد": وإن رضي المشتري بإبقاء الزرع بأجر مثل الأرض صح. (الفقه الحنفى فى ثوبه الجديد: ٩١/٤، ما يدخل فى البيع وما لا يدخل، بيروت)

وللاستزادة انظر: (جامع الفصولين: ٩٠/٢. وغمز عيون البصائر شرح الاشباه والنظائر: ١٦٩/٣)

Allāh taʿālā knows best.

Trading in cats

Question

A person keeps pedigreed cats which are very expensive. Can he trade in them? Also, what is the ruling with regard to the buying and selling of dogs?

Answer

It is permissible to buy and sell cats and dogs.

بيع الكلب المعلم عندنا جائز وكذلك بيع السنور وسباع الوحش والطير جائز. ويجوز بيع جميع الحيوانات سوى الخنزير هو المختار. (الفتاوى الهندية: ٣/١١٤)

Allāh taʿālā knows best.

Selling an item with a prize coupon

Question

A person buys an item from a shop and pays the price for it. Sometimes, the businesses give tickets to the buyers to encourage them to buy their products. If a person's number [as printed on the ticket] is called out, he receives a prize. Is it permissible to buy from a business with the sole objective of acquiring a prize? Is it permissible to accept such a prize?

Answer

If the business sells the item at a price which is the normal price everywhere else, it will be permissible to buy the item with the intention of receiving a prize. It is also permissible to accept the prize which is received for the coupon. This prize is like a donation from the businessman; it is not in exchange for anything. If the items are sold at a higher price because of the prize coupons which are attached to them, then it is harām to make efforts to buy those items in the hope of receiving the prize. It is essential for a person to abstain from such transactions because this is classified as gambling which is harām in the Sharīʿah.

Imdād al-Ahkām:

This agreement is permissible and it is a donation from the seller. It is permissible to attach a condition to a donation.[1]

Halāl Wa Harām:

A crossword puzzle is quite similar to this. A person fills the puzzle, sends it off, and pays a fee for it. If he solved the puzzle correctly, he receives a higher amount. If not, the original fee which he paid is not returned to him. Yes, if no fee is collected from those who sent the

[1] *Imdād al-Ahkām*, vol. 3, p. 386.

puzzle, it will be permissible, and the money received will be classified as a prize.[1]

It is permissible to give a gift with a precondition.

قوله والهبة والصدقة كوهبتك هذه المأة أو تصدقت عليك بها على أن تخدمني سنة،... وفى جامع الفصولين: ويصح تعليق الهبة بشرط ملائم كوهبتك على أن تعوضني كذا. (فتاوى الشامى: ٥/٢٤٩، باب ما يبطل بالشرط الفاسد، سعيد)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

Will it be correct if a person makes a condition when gifting an item? The rule of thumb in this regard is that if an appropriate condition is made, then the gift and the condition will be valid. If an inappropriate condition is made, the gift will be valid while the condition will be invalid.[2]

Further reading: *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 126.

Allāh taʿālā knows best.

Engaging in business while on hajj

Question

What is the ruling with regard to a person combining business with hajj?

Answer

If the fundamental objective is hajj while doing business is incidental to it, the person will receive the full reward for hajj. If both are the objectives, the reward for the hajj will be reduced. If business is the sole objective, he will receive no reward for the hajj. If it is an obligatory hajj, the obligation of hajj will be fulfilled.

لَيْسَ عَلَيْكُمْ جُنَاحٌ أَنْ تَبْتَغُوْا فَضْلاً مِّنْ رَّبِّكُمْ

> There is no sin upon you if you seek the bounty of your Sustainer.[3]

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[1] *Halāl Wa Harām*, p. 381.

[2] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 2, p. 87.

[3] Sūrah al-Baqarah, 2: 198.

قال الإمام القرطبي: فى الآية دليل على جواز التجارة فى الحج للحاج مع أداء العبادة وأن القصد إلى ذلك لا يكون شركاً و لا يخرج به المكلف عن رسم الإخلاص المفترض عليه، أما إن الحج دون تجارة أفضل، لعُرُوّها عن شوائب الدنيا وتعلق القلب بغيرها. (الجامع لاحكام القرآن، للقرطبى: ٢/٢٧٤. وكذا فى الماوردى: ١/١٩٨)

وفي تفسير الماوردي في تفسير قوله تعالىٰ: "ليشهدوا منافع لهم" - المنافع: إنها التجارة فى الدنيا والآخرة وهذا قول مجاهد. (تفسير الماوردى: ٤/١٩)

قوله تعالىٰ: "وأتموا الحج والعمرة لله". قال الماوردي: اختلفوا في تاويل إتمامها، منها أن تخرج من دويرة أهلك لأجلهما لا تريد غيرهما، من تجارة ولا مكسب وهذا قول سفيان الثوري. (تفسير الماوردى: ١/١٩٦)

بدائع الصنائع:

والتجارة و الإجارة لا يمنعان جواز الحج، ويجوز حج التاجر والأجير والمكاري لقول الله عز وجل: "ليس عليكم جناح أن تبتغوا فضلاً من ربكم"، قيل الفضل التجارة، ولأن التجارة والإجارة لا يمنعان من أركان الحج وشرائطهما فلا يمنعان من الجواز. (بدائع الصنائع: ٢/٢١٦، كتاب الحج، سعيد)

قال فى البحر: وتجريد السفر عن التجارة أحسن ولو اتجر لا ينقص ثوابه كالغازي إذا اتجر كما ذكره الشارح فى السير. (البحر الرائق: ٢/٣٠٩)

وفي حاشية الطحطاوي: وهذا محمول على ما إذا لم تحمله التجارة على السفر. (حاشية الطحطاوى على الدر المختار: ١/٤٨٩)

Further reading: *al-Fatāwā al-Hindīyyah*, vol. 1, p. 221; *Fath̲ al-Qadīr*, vol. 2, p. 407 and vol. 5, p. 483.

عن مجاہد قال بينا عمر بن الخطاب رضي الله عنه جالس بين الصفا والمروة إذ قدم ركب فأناخوا عند باب المسجد، فطافوا بالبيت وعمر رضي الله عنه ينظر اليهم، ثم خرجوا فسعوا بين الصفاو المروة فلما فرغوا قال: عليّ بهم فأتي بهم، فقال: ممن أنتم قالوا: من أہل العراق، قال: فما أقدمكم، قالوا: حُجّاج، قال: ما قدمتم في تجارة، ولا ميراث، ولا طلب دين، قالوا: لا، قال: أدبرتم؟ قالوا: نعم، قال: أنصبتم قالوا: نعم، قال: أحفيتم، قالوا: نعم، قال: فأتنفوا. (اخرجہ عبد الرزاق: ٥\٦\٨٨٠٦، باب فضل الحج)

وفى المرقاة: قال ابن حجر يؤخذ من قول الشافعي وأصحابہ من حج بنية التجارة كان ثوابہ دون ثواب المتخلي عنها أن القصد المصاحب للعبادة إن كان محرماً كالرياء أسقطها مطلقاً... أو غير محرم أثيب بقدر قصده الآخرة أخذاً بعموم قولہ تعالىٰ: "فمن يعمل مثقال ذرة خيراً يره." وہو تفصيل حسن وتعليل مستحسن. (مرقاة المفاتيح: ٤٦/١، ملتان)

وفي أحكام القرآن: قال بعضہم: إذا كان الداعي للخروج إلى الحج ہو التجارة (أو الإكراء كما ہو حال أكثر الجمالين) أو كانت جزأ العلة أضر ذلک بالحج لأنہ ينافى الإخلاص لله تعالىٰ بہ. (احكام القرآن للعلامة ظفراحمد التہانوى: ٣٥٢/١)

Ashraf al-Ahkām:

If the fundamental objective is to perform hajj and a person would go for hajj even if he does not have trading goods with him, the reward for hajj will not be decreased. If he has an equal intention to perform hajj and do business, then although it will be permissible to do business, the sincerity will be less. The reason why it is permissible is that he attached a lawful action [business] to his hajj; and not an unlawful action.

If business is the fundamental objective while hajj is incidental, he will be sinning and be guilty of ostentation. This is because he is deceiving

people – he is going for business while portraying himself as one going to perform hajj.

If hajj is the fundamental objective and he has sufficient provisions for the journey, then it is better not to carry any goods for business. If hajj is the fundamental objective and he has the minimum provisions for the journey, and his intention for business is incidental, then taking goods for business with the intention that it will ease the journey and help him on it will earn him rewards.[1]

وللاستزادة انظر: (رد المحتار: ٤٣٨/١، سعيد. وجامع العلوم والحكم: ٤٠/١. وفتاوى محموديه: ٤٥٢/١٠. وفتاوى رحيميه: ٣٤/٧. شرح الاربعين للامام النووى: ٩/١، لعطية بن محمد سالم)

Allāh taʿālā knows best.

Returning an item when it is more than what was estimated

Question

Zayd went to a jeweller and said: "I have some jewellery to sell." The jeweller informed him that the jewellery contains two ounces of gold while the remainder is not pure gold, and that he will pay him R10 000 for the two ounces (R5 000 per ounce). After the jeweller melted the jewellery, he realized that it contained two and half ounces of pure gold. Is it necessary for him to pay the original owner [Zayd] for the extra gold?

Answer

It is necessary for him to convey the money for the extra gold to the owner. Yes, if after weighing the jewellery, the jeweller said: "The value of whatever gold this jewellery contains is R10 000", then it is not necessary to pay him for the extra gold.

الهداية:

و من ابتاع صبرة طعام على أنها مائة قفيز بمائة درهم... وإن وجدها أكثر فالزيادة للبائع. (الهداية: ٢٢/٣)

[1] *Ashraf al-Ahkām*, p. 148 as quoted from *Kamālāt Ashrafiyyah*, p. 105.

وقال بعتكها على أنها مائة ذراع بمائة دراهم كل ذراع بدرهم ... وإن وجدها زائدة فهو بالخيار إن شاء أخذ الجميع كل ذراع بدرهم وإن شاء فسخ البيع، لأنه إن حصل له الزيادة فى الذراع تلزمه زيادة الثمن. (الهداية: ٣/٢٣)

الموسوعة ا لفقهية:

إذا ظهر نقص أو زيادة فيما بيع مقدراً بكيل أو وزن أو ذراع أو عد فإن كان الثمن مفصلاً، كما لو قال: كل ذراع بدرهم، فالزيادة للبائع. (الموسوعة ا لفقهية: ٩/٢٤)

وإذا باع البيع جزافاً فلا أثر لظهور النقص أو الزيادة عما توقعه المشتري أو البائع. (الموسوعة: ٩/٢٤)

Allāh taʿālā knows best.

Withholding an item until full payment is received in an instalment-transaction

Question

Zayd bought a machine from Bakr for R300 000 which will be paid over a period of three months. He will pay R100 000 per month. Bakr is now laying down a condition that he will not hand over the machine to Zayd until the latter pays the full month. Is this condition permissible?

Answer

Zayd became the owner of the machine upon the completion of the transaction. Bakr (the seller) does not have the right to withhold the item in this instalment-transaction. Yes, he may keep it as a mortgage. This could be done in two ways:

1. Zayd leaves the machine with Bakr as a mortgage before he can take possession of it. This is not permissible because in a credit transaction, it is not permissible to withhold the sale item so as to acquire the money for it.

2. Zayd takes possession of the machine, and then leaves it with the seller as a mortgage. This is permissible. Once Zayd pays the full amount, Bakr will hand the machine over to Zayd.

الفتاوى الهندية:

قال أصحابنا: للبائع حق حبس المبيع لاستيفاء الثمن إذا كان حالاً كذا فى المحيط، وإن كان مؤجلاً فليس للبائع أن يحبس المبيع قبل حلول الأجل ولا بعده كذا فى المبسوط. (الفتاوى الهندية: ۳/۱۵، الباب الرابع فى حبس المبيع بالثمن)

المحيط البرهانى:

قال أصحابنا: وللبائع حق حبس المبيع لاستيفاء الثمن إذا كان الثمن حالاً، لأن البايع عين حق المشتري فى المبيع، فيجب على المشتري تعيين حق البائع فى الثمن تحقيقاً للتساوي بينهما... وإن كان الثمن مؤجلاً لم يكن له حق الحبس، لأن حق الحبس إنما يثبت للبائع تحقيقاً للتسوية بينهما، وقد سقط حق البائع فى المساواة بحكم التأجيل فيسقط حقه فى الحبس ضرورة. (المحيط البرهانى: ۷/۲۲۲، مكتبه رشيديه)

المبسوط:

ويبقى حق البائع فى الحبس إلا أن يكون الثمن مؤجلاً فحينئذٍ ليس للبائع أن يحبس المبيع قبل حلول الأجل ولا بعده لأن قبل حلول الأجل ليس له أن يطالب بالثمن وإنما يحبس المبيع بماله أن يطالبه من الثمن وأما بعد حلول الأجل فلأن حق الحبس لم يثبت له بأصل العقد فلا يثبت بعد ذلك تبعاً بهذا الحق ما كان له من استحقاق اليد قبل البيع فإذا لم يبق ذلك بعد العقد لا يثبت ابتداء بحلول الأجل. (المبسوط للامام السرخسى: ۱۳/۱۹۲، ادارة القرآن)

بدائع الصنائع:

ومنها ثبوت حق الحبس للمبيع لاستيفاء الثمن وهذا عندنا... أما شرط ثبوته فشيئان أحدهما أن يكون أحد البدلين عيناً والآخر ديناً فإن كانا عينين أو دينين فلا يثبت حق الحبس بل يسلمان معاً ... والثاني أن يكون الثمن حالاً فإن كان مؤجلاً لا يثبت حق الحبس لأن ولاية الحبس تثبت حقاً للبائع لطلبه المساواة عادة... ولما باع بثمن مؤجل فقد أسقط حق نفسه فبطلت الولاية. (بدائع الصنائع: ٢٤٩/٥، سعيد)

وللاستزادة انظر: (الهداية: ٥٣٣/٤، والكفاية على هامش فتح القدير: ٩٩/٩، رشيدية، والفتاوى البزاية: ٥٥/٦، والدر المختار: ٤٩٧/٦، سعيد، واسلام اور جديد معاشى: ٩٦/٣، ٩٨، وجديد مسائل: ٢٦٥/٤)

Allāh ta'ālā knows best.

Resorting to deception in a transaction

Question

A person received a counterfeit R5 coin. He learnt that it is counterfeit. Can he use it, or does he have to throw it away? In other words, if a person has been duped into accepting a R5 coin, can he now use it by deceiving someone else? It is possible that the second person will also do the same because it is difficult to ascertain whether it is genuine or not.

Answer

It is not permissible to use that counterfeit R5 coin because it entails deception. Yes, if there is an institution, like a bank, which accepts counterfeit coins so as to put an end to them, it will be permissible for this person to inform the bank that it is counterfeit and give it over to the bank. The Hadīth prohibits deceiving and cheating.

عن أبي هريرة رضي الله عنه أن رسول الله صلى الله عليه وسلم مر على صبرة من طعام فأدخل يده فيها فنالت أصابعه بللاً، فقال: يا صاحب الطعام ما هذا؟ قال: أصابته السماء يا رسول الله. قال: أفلا جعلته فوق الطعام حتى يراه

الناس ثم قال: من غش فليس منا. (رواه الترمذى: ٢٤٥/١، باب ما جاء فى كراہية الغش فى البيوع)

الدر المختار:

لا يحل كتمان العيب في مبيع أو ثمن لأن الغش حرام. وفى الشامية قولہ لأن الغش حرام، ذكر فى البحر أول الباب بعد ذلک عن البزازية عن الفتاوى: إذا باع سلعة معيبة عليہ البيان، وإن لم يبين قال بعض مشايخنا يفسق وترد شہادتہ، قال الصدر:لا نأخذ بہ، قال فى النہر: أى لا نأخذ بكونہ يفسق بمجرد ہذا لأنہ صغيرة، قلت: وفيہ نظر لأن الغش من أكل أموال الناس بالباطل فكيف يكون صغيرة، بل الظاہر في تعليل كلام الصدر إن فعل ذلک مرة بلا إعلان لا يصير بہ مردود الشہادة وإن كان كبيرة. (الدر المختار مع رد المحتار: ٤٧/٥، سعيد)

(ولو قبض زيفاً بدل جيد) كان لہ على آخر (جاہلاً بہ) فلو علم وأنفقہ كان قضاء اتفاقاً (ونفق أو أنفقہ) فلو قائماً رده اتفاقاً (فہو قضاء) لحقہ وقال أبو يوسف: إذا لم يعلم يرد مثل زيفہ ويرجع بجيده استحساناً كما لو كانت ستوقة أو نبہرجة، واختاره للفتوىٰ ابن كمال قلت: ورجحہ فى البحر والنہر والشرنبلالية فبہ يفتىٰ. (الدر المختار: ٢٣٣/٥، سعيد)

وفي تقريرات الرافعي: قول الشارح كما لو كانت ستوقة أو نبہرجة أى فإنہ يرجع بالجياد اتفاقاً. (التحرير المختار: ١٧١/٥، سعيد)

وفي رد المحتار: والنبہرجة: ما يرده التجار، والستوقة: أن يكون الطاق الأعلى فضة والأسفل كذلک وبينہما صفر وليس لہا حكم الدراہم. (رد المحتار: ٢٣٣/٥، سعيد)

Imdād al-Muftīyyīn:

Question: I received a note which has traces of oil. I learnt that the government ruling with regard to such a note is that it must be sent to the currency office, or a note bearing the same number must be printed and the printed one will be taken. Is there any sin if I use this note?

Answer: The harm to the one who accepts this note is that he will have to pay the price for its printing. It is therefore not permissible to give it to him without informing him and obtaining his approval.[1]

A person who has been duped cannot do the same to another person. Yes, a person should protect himself against harm and oppression as much as he can.

المظلوم له أن يدفع الظلم عن نفسه بما قدر عليه لكن ليس له أن يظلم غيره. (قواعد الفقه، ص ١٢٤، بحواله السير الكبير مع شرحه: ٤/٢٢٢)

Allāh taʿālā knows best.

Returning a defective item

Question

A person bought goat-meat and after bringing it to his house, he learnt that it is steak. Can he return it? What if he only realized after he started eating it? How will he return it?

Answer

If he comes to know of this before he uses it, he may return it. If he learns of it after eating it, then the issued verdict is that he may return it in exchange for the loss. In other words, if he bought one kilo goat-meat for R20, while the steak sells for R15, he has the right to collect R5 from the seller.

شرح المجلة:

أو لحم معز فكان لحم ضأن، وعلى عكسه ونحو ذلك، فله الخيار... وفى العينى عن الهداية: ولو امتنع الرد بسبب من الأسباب رجع المشتري على البائع

[1] *Imdād al-Muftīyyīn*, vol. 2, p. 1026.

بحصته من الثمن فيقوم العبد كاتباً وغير كاتب وينظر إلى تفاوت ما بين ذلك فإن بمقدار العشر مثلاً رجع بعشر الثمن، ومثله فى البحر وغيره، وقال الطحطاوي في حاشيته على الدر: يعنى يعتبر التفاوت من الثمن، فإن هذا البيع صحيح لا نظر فيه إلى القيمة. (شرح المجلة لمحمد الاتاسى: ٢/٢٥٣، ٢٥٥، الفصل الثانى فى بيان خيار الوصف)

الفتاوى الولوالجية:

رجل اشترى طعاماً فوجد به عيباً وقد أكل بعضه يرجع بنقصان عيب ما أكل، ويرد ما بقي بحصته لأن بالأكل تقرر العقد فتتقرر أحكامه وهذا قول محمد وبه كان يفتى الشيخ الفقيه أبو جعفر الهندوانى وبه أخذ الفقيه أبو الليث فإن باع نصفه يرد ما بقي عند محمد وعليه الفتوىٰ. (الفتاوى الولوالجية: ٣/٢٥٣)

فتح باب العناية:

وأما أكل الكل ولبس الثوب فالمذكور هنا قول أبي حنيفة والقياس أن يرجع بالنقصان وهو قولهما ومذهب الشافعي وأحمد وبه أخذ الطحاوي وفى الخلاصة عليه الفتوىٰ. (فتح باب العناية: ٣/٢٢٨)

خلاصة الفتاوىٰ:

ولو اشترى سمناً ذائباً فأكله ثم أقر البائع أن الفارة وقعت فيها وماتت له أن يرجع بنقصان العيب، عند أبي يوسف ومحمد وعليه الفتوىٰ. (خلاصة الفتاوىٰ: ٣/٦٩)

Allāh taʿālā knows best.

Specifying a profit margin

Question

Did the Sharīʿah specify a profit margin? In other words, how much profit can a person make? Is it permissible to make a 100% profit?

Answer

The Sharīʿah does not specify a profit margin. Rather, it has left it to the natural rise and drop in prices. Yes, Rasūlullāh sallallāhu ʿalayhi wa sallam considered a balance and appropriateness when giving and taking so that a balance in the price is maintained. However, it is makrūh to have such a high profit margin which causes it to be classified as *ghabn fāhish.* A *ghabn fāhish* means that an item is far more than what is estimated by those who put values to items.

وقال في "الفقه الحنفي في ثوبه الجديد": وعرف الفقهاء الحنفية الغبن الفاحش بأنه ما لا يدخل تحت تقويم المقومين من أهل الخبرة، فلو قوم السلعة أحدهم بمائة درهم وقومها الثاني بخمسة وتسعين وقومها الثالث بتسعين مثلاً، فبيعها بما بين التسعين والمائة فيه غبن يسير، وبالتسعين فما دونها غبن فاحش بالبائع، وبالمائة فما فوقها غبن فاحش بالمشترى.

ثم حدد المتأخرون من الفقهاء الغبن الفاحش للتيسير فى الفتوىٰ والقضاء والتطبيق، أنه ما بلغ خمس القيمة فى العقار وعشرها فى الحيوان ونصف العشر فى العروض وسائر المنقولات، وبهذا أخذت مجل الأحكام العدلية فى المادة :١٦٥ منها. (الفقه الحنفى فى ثوبه الجديد: ١٩٣/٤)

الهداية:

قال: ولا ينبغي للسلطان أن يسعر على الناس لقوله عليه الصلاة والسلام: لا تسعروا فإن الله هو المسعر القابض الباسط الرازق ولأن الثمن حق العاقد فإليه تقديره... إلا إذا تعلق به دفع الضرر العامة... فإن كان أرباب الطعام يتحكمون ويتعدون عن القيمة تعدياً فاحشاً وعجز القاضى عن صيانة

حقوق المسلمين إلا بالتسعير فحينئذٍ لا بأس به بمشورة من أهل الراي والبصيرة. (الهداية: ٤/٤٧٢، كتاب الكراهية، فصل فى البيع)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

The Sharīʿah did not specify a limit to the amount of profit a person can make when selling goods. It does not say that if you buy a certain item, you can only have a certain percentage as your profit, and not more. Rather, the Sharīʿah leaves it to the two parties [seller and buyer] – they can come to an agreement by mutual consent. However, it is against humaneness to make such large profits which causes loss to people, or to take undue advantage of those who have no alternative. It is therefore the duty of the government to take the necessary measures to prevent people from having the power to enforce exorbitant profits.

At the same time, it is a major sin to praise a sale item unduly, to conceal its defect, to sell counterfeit goods as though they were genuine, and to collect excessive money through deception.

قال العلامة على حيدر رحمه الله: وجاء تعريف البيع في كثير من الكتب الفقهية بأنه مبادلة المال بالمال بالرضاء. (درر الحكام شرح مجلة الاحكام: ١/١٠٦)[1]

Kitāb al-Fatāwā:

The Sharīʿah did not specify any percentage for profits. It left it to the norms among traders and the mutual consent of buyers and sellers. However, the jurists say that it is makrūh to have such a high mark-up which would fall under *ghabn fāhish*. This refers to demanding a price which is higher than the highest selling price of an item in the business world.[2]

Allāh taʿālā knows best.

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[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 86.

[2] *Kitāb al-Fatāwā*, vol. 5, p. 213.

A prize given by a wholesaler

Question

Some companies give prizes to retailers for the promotion of their products. For example, a company will inform a retailer that for a certain number of days in a year, he must keep an account of the products which he bought from the company during that period. The company will then give the retailer a prize for each item which he bought.

Now who should receive the prize? The shop owner says that he ought to receive it because the goods were sold from his shop, while the employees receive a wage for their work. On the other hand, the employees are demanding that they should receive the prize because the company [which gave the prize] said that it gives the prize for the employees.

The employees produced a letter of the company which states that the prize must be given to the employees. What is the ruling of the Sharīʿah? Who is eligible for the prize?

Answer

As per the norm, the prize or discount on the products which is given by a company or seller as a prize is given to the shop owner. It is given because of his purchase of the products.

Maulānā Zafar Ahmad ʿUthmānī rahimahullāh writes in *Imdād al-Ahkām* that the commission which the buyer receives at the end of the year is a donation from the seller…[1]

Kitāb al-Fatāwā:

If a buyer receives additional items – as a prize – for whatever he bought, there is no doubt about its permissibility. It is an addition given over by the seller, and the jurists say that it is permissible for the seller to give more.[2]

Further reading: *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 126.

In the case under question, the company made it clear on several occasions that the prize is for the employees. Therefore, according to the Sharīʿah, they will be eligible for the prize.

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[1] *Imdād al-Ahkām*, vol. 3, p. 386.

[2] *Kitāb al-Fatāwā*, vol. 5, p. 249.

Allāh ta'ālā knows best.

The issue of eligibility as regards a sale-item

Question

A few persons bought a piece of land and then built a wall around it. When they built the wall, they included a portion of the municipal property which was on the side of the main road. They then sold that section of the land which was on the side of the main road. Before they could sell it, they received a letter from the municipality stating that the section on the side of the main road belongs to the municipality. They should therefore demolish that section of the wall and build it within their boundary. The owners did not pay heed. At the time when they were selling the land, they forgot to inform the buyer of the situation. The buyer now suffered a loss in two respects: (1) The wall was demolished and he will have to incur a lot of expenses to rebuild it. (2) One thousand square metres of the land which he had paid for has been taken away.

Can the buyer collect the money from the seller to pay for the cost of rebuilding the wall? Can he ask for a refund in relation to the 1 000 square metres which has been taken away from him?

Answer

The seller is not accountable for the demolished wall. The buyer may rebuild it at his expense for his security purposes. The reason for saying this is that the previous wall was not included in the transaction. The sale was with respect to the land only, the wall was not the objective; it was subordinate to the land. The price which is paid is in exchange for the original item.

الثمن يكون فى مقابلة الأصل، لا فى مقابلة الوصف والتابع.

ومن اشترى ثوباً على أنه عشرة أذرع بعشرة أو أرضاً على أنها مأة ذراع بمأة، فوجدها أقل، فالمشتري بالخيار: إن شاء أخذها بجملة الثمن، وإن شاء ترك لأن الذراع وصف فى الثوب، ألا ترى أنه عبارة عن الطول والعرض والوصف لا يقابله شيء من الثمن كأطراف الحيوان فلهذا يأخذه بكل الثمن. (الهداية: ٢٣/٣) ثم أشار فيما بعد أن الوصف هو التابع.

وفى الفقه الحنفى في ثوبه الجديد: قال: الوصف ما يدخل تحت البيع بلا ذكر كالشجار والبناء فى الأرض، والأطراف فى الحيوان والجودة فى الكيلي والوزني. (الفقه الحنفى فى ثوبه الجديد: ١٠٦/٤، ط: دمشق)

The buyer can ask the seller to refund the money which he paid in respect of the 1 000 square metres which was taken away by the municipality. The seller can also revert to the person from whom he had bought the property.

ولو تداولته الأيدي ثم قطع في يد الأخير، رجع الباعة بعضهم على بعض عنده كما فى الاستحقاق... وقوله فى الكتاب: ولم يعلم به المشترى يفيد على مذهبهما، لأن العلم بالعيب رضاء به، ولا يفيد على قوله فى الصحيح، لأن العلم بالاستحقاق لا يمنع الرجوع. (الهداية: ٤٨/٣، باب خيار العيب)

وفي شرح المجلة نقلاً عن جامع الفصولين: شراه عالماً بأنه ليس لبائعه ثم استحق، رجع بثمنه. (شرح المجلة للاتاسى: ٤٦٢/١)

وفى الموسوعة الفقهية الكويتية: يحرم شراء الشيء المستحق عند العلم بالاستحقاق، فإن حصل البيع مع علم المشتري بالاستحقاق فللمشترى الرجوع بالثمن على البائع عند الاستحقاق إذا ثبت بالبينة. (الموسوعة الفقهية الكويتية: ٨٧/٤)

Allāh ta'ālā knows best.

Trading in shares

Question

Nowadays, shares are bought and sold excessively. Is it permissible to trade in shares? In other words, a person buys some shares with the intention of selling them at a profit when their value increases. What is the ruling in this regard.

Answer

Nowadays, trading in shares has become an important and profitable way of trade. Shares are sometimes bought directly from a company

and sometimes through agents. A person may even sell his own shares on an individual level to someone else. All three forms are permissible, and in all three, the owners of the shares have either taken possession of the shares themselves, or the company managers and administrators manage the shares on behalf of the shareholders.

When buying or selling something, it is necessary for the seller to be either the owner of the item or be a representative on behalf of the seller. Both these are found in this case.

The buying and selling in this case is not the buying and selling of money, whose documentation the shareholders have acquired. Rather, it is a bond for the goods, and a buying and selling of the goods whose initial price was laid down by the company. Now if the goods are sold while there are fluctuations in their price, then this will not be classified as usury.

Since the buying and selling of shares has been classified as permissible in principle, the injunction will depend on the nature of the company. If the company engages in lawful trade, it will be permissible to buy its shares irrespective of whether the company owners are Muslim or non-Muslim. If the company engages in unlawful and non-Sharīʿah-compliant trade – e.g. alcohol, statues, etc. – then it will not be permissible to buy shares in such a company.

<u>A Few Points Related to Shares</u>

1. A person has taken possession of the shares certificate, or the shareholder's ownership equal to the number of shares is established in a company – an indication of which is that if the company suffers a loss, the recompense for the loss will have to be borne by the shareholder as well. If actual possession of the shares is not taken or if the ownership is not established with certainty, then they cannot be sold to someone else.

Nowadays, most of the trading in shares is done over the internet. When a person buys the shares, the amount is immediately deducted from his account. He then receives an email informing him of his ownership of a certain number of shares. The buyer can then obtain a receipt for his share purchase, and this is synonymous to a legal possession. The certificate of the seller is considered invalidated from that time. The one who bought the shares ought to be able to resell them, even if he hasn't received the share certificate as yet.

Transfer of funds via the internet is classified as a legal possession according to *Maʿāyīr Sharʿīyyah*. This book has been compiled by twenty-seven eminent muftīs. The following is stated therein:

إن كيفية قبض الأشياء تختلف بحسب حالها واختلاف الأعراف فيما يكون قبضاً لها، فكما يكون القبض حسياً في حالة الأخذ باليد أو النقل أو التحويل إلى حوزة القابض أو وكيله يتحقق أيضاً اعتباراً وحكماً بالتخلية مع التمكين من التصرف، ولو لم يوجد القبض حسياً، فقبض العقار يكون بالتخلية وتمكين اليد من التصرف، فإن لم يتمكن المشتري من المبيع فلا تعتبر التخلية قبضاً، أما المنقول فقبضه بحسب طبيعته. المعايير الشرعية، ص ١٢٢)

2. Some of those who trade in shares have no intention whatsoever of buying and selling shares (the item and the price are non-existent). It is not their aim to acquire the share certificate nor do they bother about acquiring it. The purpose of the entire verbal arrangement as regards its outcome is to balance the profits and losses. This form is also totally harām on the basis of gambling and speculation.

3. Goods which are present are permissible irrespective of whether they are with the intention of investment or selling the shares and earning a profit.

4. A short sale – i.e. selling something which one does not own – is not permissible. If the seller does not own the shares, and he is engaged in a short sale or a blank sale, then this will be unlawful and invalid on the basis of "selling something which is not owned by the seller".

5. If the seller owns some shares and has taken delivery of them, and he is concluding a transaction for the future via an immediate offer and acceptance – also known as a forward sale (*al-bayʿ al-mudāf ilā al-mustaqbal*) – then this is impermissible.

6. A future sale is also impermissible. It is classified as speculation which was explained previously under number two. This refers to the buying and selling of shares in such a way that the person has no intention of buying and selling them. All he wants to do is balance the profits and losses, and earn a profit. This is impermissible.

7. A point of consideration is that if a shareholder wants to terminate his participation and leave the company, he cannot do so without selling the shares to someone else. This is an agreement laid down by the company from the beginning; and it is necessary to adhere to the agreement. There is room to practise on this.

8. If the company engages in usurious transactions, the shareholder must raise his objection in the annual meeting.

9. When the profits are distributed, the shareholder will have to give in charity whatever interest was deposited on the profits.

10. According to some scholars, when the shares are to be sold at a price which is higher or lower than the share value, the goods of the company must not be in the form of cash only.

11. The company rules state that the company will take interest-incurring loans from various banks. If this is the case, it is impermissible. All the shareholders will be committing the sin of usury.

However, this usurious transaction is insignificant and of a small amount, and is also not the objective in itself – but is merely incidental and subordinate. Furthermore, large companies are sometimes forced to take because of governmental laws or to repulse a harm (e.g. as a relaxation from oppressive taxes). This is why there can be leeway for it. Then if it is a non-Muslim company, there will be further relaxation as explained in detail by Hadrat Maulānā Zafar Ahmad Thānwī rahimahullāh in *Imdād al-Ahkām*, (vol. 4, pp. 397-440). The gist of his explanation is that while taking the majority into consideration, there is leeway for it. However, the small amounts of interest which are found in a company's income – when the shareholders receive their profits, they must give that percentage [of interest] as charity.

12. In addition to receiving a salary, the company manager receives an "allowance" which is unknown. If it is based on a percentage, it will be permissible.

Further reading: *Jadīd Fiqhī Masā'il*, vol. 1 and 4; *Islām Aur Jadīd Ma'īshat Wa Tijārat*, pp. 103-112; *Jadīd Fiqhī Mabāhith*, vol. 16; *Fatāwā 'Uthmānī*, vol. 3; *Īdāh an-Nawādir*, vol. 1; *Imdād al-Fatāwā*, vol. 3; *Imdād al-Ahkām*, vol. 4, p. 399; *Na'e Masā'il Aur 'Ulamā'-e-Hind Ke Fayslei*, p. 111; *Aham Fiqhī Fayslei*, p. 109; *'Asr Hādir Ke Pechīdah Masā'il Aur Oen Kā Hull*, vol. 2, p. 235; *Jadīd Mu'āmalāt Ke Shar'ī Ahkām*, vol. 1.

Allāh ta'ālā knows best.

A short sale

Question

Is a short sale permissible?

Answer

A short sale actually refers to selling something which you do not own. In other words, a seller sells shares which are not in his ownership as yet. He anticipates the acquisition of goods and thinks to himself that once he acquires them, he will give the shares to the buyer. A short sale of this nature is not permissible.

حدثنا قتيبة ثنا ہشيم عن أبي بشر عن يوسف بن مالک عن حکيم بن حزام رضي الله عنه قال: سألت رسول الله صلى الله عليه وسلم فقلت: يأتينى الرجل فيسألني من البيع ما ليس عندي أبتاع له من السوق ثم أبيعه قال: لا تبع ما ليس عندک. (ترمذی شریف: ۲۳۳/۱، باب ما جاء فی کراہیة بیع ما لیس عنده)

A short clarification of this issue was given previously under the question on trading in shares.

Yes, if only a promise of a sale was made without a sale in reality, and the goods or shares will be sold after they have been acquired, then this transaction will be permissible.

Allāh ta'ālā knows best.

Acting as a guarantor on behalf of a deceased

Question

A person passed away without leaving behind any properties and wealth. He was in debt of R100 000. His creditors began harassing his two sons. A person living in that area took the responsibility of the debt so that the lives of the heirs may be spared. After some time, the creditors asked the guarantor for the money, but he replied: "I gave the guarantee merely to save the lives of the heirs." He added: "The books of jurisprudence state that there can be no guarantee on behalf of a deceased person, unless the latter has left behind some wealth or it is a guarantee for the condition of life." Now there is a dispute between the creditors and the guarantor. Will the guarantor be compelled to pay the debts?

Answer

The Hanafī jurists differ on this issue. Imām Abū Hanīfah rahimahullāh is of the view that this guarantee is not valid. The jurists give preference to this view. Imām Abū Yūsuf and Imām Muhammad

raẖimahumallāh are of the view that it is valid. The *Majallah* and *Sharẖ Majallah* give preference to the second view. Bearing in mind the second view, the guarantor will be responsible to pay the amount, and he will fulfil his promise. Yes, if someone pays off the debt voluntarily on behalf of the deceased, it is unanimously considered to be correct and permissible.

وكذا تصح الكفالة بعد موته مفلساً... أما لو مات مفلساً وعليه دين لحقه في حياته لا كفيل به ولا رهن فكفله إنسان فعند أبي حنيفة لا تصح الكفالة به... وعندهما تصح لأن الدين لما كان ثابتاً في حياته لا يسقط إلا بالأداء أو الإبراء... لكن ظاهر هذه المادة أن جمعية المجلة قد اختارت قول الإمامين الموافق لما قال به الأئمة الثلاثة وأكثر أهل العلم كما في فتح القدير لأنها أطلقت صحة الكفالة عن المفلس ولم تقيدها بكون المفلس حياً ولو كان مرادها التقييد بذلك لما سكتت عن بيان حكم الكفالة بدين من مات مفلساً وإذا كانت جمعية المجلة قد اختارت قولهما يجب العمل به. (شرح المجلة لمحمد الاتاسی: ٣٢/٣، المادة: ٦٣٣. وكذا فی شرح المجلة لعلی حيدر: ٦٥٠/٣)

<u>فتح القدير:</u>

وقال أبو يوسف ومحمد والأئمة الثلاثة وأكثر أهل العلم تصح لأنه كفل بدين ثابت لعموم قوله صلى الله عليه وسلم "الزعيم غارم" ولما روي أنه صلى الله عليه وسلم أتي بجنازة...الخ، فلو لم تصح عن الميت المفلس لما صلى عليه بعد الكفالة ولأنه كفل بدين ثابت. (فتح القدير: ٣٠٤/٧، دار الفكر)

<u>عمدة القاری:</u>

الكفالة من الميت... فقال ابن أبي ليلى ومحمد وأبو يوسف والشافعی: الكفالة جائزة عنه وإن لم يترك الميت شيئاً ولا رجوع له فی الميت إن ثاب للميت مال. (عمدة القاری: ٦٥٠/٨، ملتان)

وللاستزادة انظر: البحر الرائق: ٢٣٢/٦، العناية: ٢٠٤/٧، شرح المجلة لرستم باز: ٢٣٥/١، البناية: ٢٤٧/٣، تبيين الحقائق: ١٥٩/٤، بدائع الصنائع: ٦/٦، سعيد)

Allāh taʿālā knows best.

Doing business with a non-Muslim who supports Israel

<u>Question</u>

An organization has ties with the Israeli army and supports it. The Israeli army is well-known for its open enmity towards Palestinian Muslims and oppression against them. This organization is listed on the Tel Aviv stock exchange. Is it permissible to join this organization to open a TV channel? We know with certainty that this deal will eventually benefit the Israeli army.

What can be said about a person who continues doing business with such an organization while knowing what was just noted?

Kindly provide proofs from the Qur’ān and Sunnah because those who are involved in these dealings are demanding proofs.

If you have any other fatwā related to this, kindly forward it to me.

<u>Answer</u>

In normal situations, it is permissible to do business with Jews, Christians and other non-Muslims provided they are not at open war with Muslims. This is established from the Qur’ān and <u>H</u>adīth.

لَا يَنْهَاكُمُ اللهُ عَنِ الَّذِيْنَ لَمْ يُقَاتِلُوْكُمْ فِي الدِّيْنِ وَلَمْ يُخْرِجُوْكُمْ مِّنْ دِيَارِكُمْ أَنْ تَبَرُّوْهُمْ وَتُقْسِطُوْا إِلَيْهِمْ، إِنَّ اللهَ يُحِبُّ الْمُقْسِطِيْنَ.

> Allāh does not forbid you to show kindness and to deal justly with those who have neither fought with you on account of religion nor expelled you from your homes. Surely Allāh loves those who are just.[1]

Rasūlullāh <u>s</u>allallāhu ʿalayhi wa sallam himself had dealings with the Jews and Christians.

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[1] Sūrah al-Mumta<u>h</u>inah, 60: 8.

عن عائشة رضي الله تعالىٰ عنها أن النبي صلى الله عليه وسلم اشترىٰ طعاماً من رجل يهودي إلى أجل ورہنہ درعاً من حديد. (رواه البخارى: ٢٧٧/١)

> Rasūlullāh sallallāhu ʿalayhi wa sallam bought food from a Jew on credit until an appointed time, and he gave him a steel armour as mortgage.

Rasūlullāh sallallāhu ʿalayhi wa sallam entered into a share-cropping agreement with the Jews of Khaybar.

قام عمر رضي الله عنه خطيباً فقال: إن رسول الله صلى الله عليه وسلم كان عامل يهود خيبر على أموالهم وقال: نقركم ما أقركم الله. (رواه البخارى: ٣٧٧/١)

Hadrat Jābir radiyallāhu ʿanhu used to do business with non-Muslims.

عن جابر بن عبد الله رضي الله عنه قال:كان بالمدينة يهودي وكان يسلفني في تمري إلى الجذاذ. (رواه البخارى، كتاب الاطعمة، ٨١٨/٢)

وعنہ أنہ أخبره أن أباه توفي وترک عليہ ثلاثين وسقاً لرجل من اليهود. (رواه البخارى: كتاب الاستقراض، ٣٢٢/١)

However, non-Muslims who have become bitter enemies of Muslims and are openly at war with them, who are leaving no stone unturned in oppressing and tyrannizing Muslims, whose second nature it is to shed Muslim blood by day and night – as is the case with the present day Israeli army – it is not permissible to have supportive dealings with them and with organizations which support their army. This is proven from the Qur'ān, Hadīth and texts of the jurists. It is a major sin to support and aid anyone to oppresses Muslims when it is known with certainty that this organization helps the Israeli army.

Observe the following proofs:

> إِنَّمَا يَنْهَاكُمُ اللهُ عَنِ الَّذِينَ قَاتَلُوكُمْ فِي الدِّينِ وَأَخْرَجُوكُمْ مِنْ دِيَارِكُمْ وَظَاهَرُوا عَلٰى إِخْرَاجِكُمْ أَنْ تَوَلَّوْهُمْ وَمَنْ يَتَوَلَّهُمْ فَأُولٰئِكَ هُمُ الظَّالِمُونَ.

Allāh only forbids you from befriending those who fight you on account of religion and expel you from your homes and joined others in expelling you. Whoever befriends them, it is they who are truly wrongdoers.[1]

وَلَا تَعَاوَنُوْا عَلَى الْإِثْمِ وَالْعُدْوَانِ ۖ وَاتَّقُوا اللّٰهَ ۖ إِنَّ اللّٰهَ شَدِيْدُ الْعِقَابِ.

Do not help each other in sin and oppression. Continue fearing Allāh. Surely the punishment of Allāh is severe.[2]

قال العلامة الآلوسى البغدادى: فيعم النهي كل ما هو من مقولة الظلم والمعاصي ويندرج فيه النهي عن التعاون على الاعتداء والانتقام. (روح المعانى: ٥٧/٦)

وقال الإمام القرطبي: وأن يكون المسلمون متظاهرين كاليد الواحدة (المؤمنون تتكافأ دماؤهم ويسعى بذمتهم أدناهم وهم يد على من سواهم، ويجب الإعراض عن المتعدي وترك النصرة له ورده عما هو عليه، ثم نهى فقال: "ولا تعاونوا على الإثم والعدوان" وهو الحكم اللاحق عن الجرائم، وعن العدوان وهو ظلم الناس. (الجامع لاحكام القرآن: ٣٣/٣)

وفى الدر المنثور فى التفسير الماثور: وأخرج ابن ماجة عن أبي هريرة رضي الله عنه، أن رسول الله صلى الله عليه وسلم قال: من أعان على قتل مؤمن ولو بشطر كلمة، لقي الله مكتوب بين عينيه آيس من رحمة الله.

Rasūlullāh sallallāhu ‘alayhi wa sallam said: The one who aids in killing a believer - even if it is by half a

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[1] Sūrah al-Mumtahinah, 60: 9.

[2] Sūrah al-Mā’idah, 5: 2.

word - shall meet Allāh while it will be written on his forehead: "Despairing of Allāh's mercy."

وأخرج الطبراني فى الأوسط والحاكم عن ابن عباس رضي الله عنه، أن رسول الله صلى الله عليه وسلم قال: من أعان ظالماً بباطل ليدحض به حقاً فقد برئ من ذمة الله ورسوله.

Rasūlullāh sallallāhu ʿalayhi wa sallam said: The one who aids an oppressor in falsehood so as to subdue the truth has certainly divested himself of the protection of Allāh and His Messenger.

وأخرج البخاري في تاريخه والطبراني والبيهقي في شعب الإيمان عن أوس بن شرحبيل رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم: من مشى مع ظالم ليعينه وهو يعلم أنه ظالم فقد خرج من الإسلام.

Rasūlullāh sallallāhu ʿalayhi wa sallam said: The one who walks with an oppressor for the sake of helping him, while knowing that he is an oppressor has in fact left Islam.

وأخرج الحاكم وصححه والبيهقي عن عبد الرحمٰن بن عبد الله بن مسعود رضي الله عنه عن أبيه قال: قال رسول الله صلى الله عليه وسلم: من أعان قوماً على ظلم فهو كالبعير المتردى فهو ينزع بذنبه. (الدر المنثور: ١٢/٦)

Rasūlullāh sallallāhu ʿalayhi wa sallam said: A person who helps a nation in committing oppression is like a falling camel. He will suffer the agony of death with his sins.

Ithm and *ʿudwān* are classified as serious crimes, and we are prohibited from helping anyone in committing them. The literal meaning of *ʿudwān* is to transgress the limit. It refers to oppression and tyranny. Ibn Kathīr relates from Tabarānī that Rasūlullāh sallallāhu ʿalayhi wa sallam said: "The one who walks with an oppressor while knowing that

he is an oppressor has in fact left Islam." This is why the pious predecessors strictly abstained from being employed by an oppressive ruler or accepting any post by him. After all, it would entail supporting him in his oppression. Under the verse: "I will never again be a helper of the sinners"[1] in *Rūh al-Maʿānī*, the following Hadīth is quoted: Rasūlullāh sallallāhu ʿalayhi wa sallam said: "An announcement will be made on the day of Resurrection: Where are the oppressors and their supporters?! Even those who made ready the ink-pots and pens for oppressors will be assembled in a steel coffin and then cast into the Hell-fire."[2]

It is the duty of Muslims to help Palestinian Muslims with their lives and wealth, and to stop the oppressors from their oppression. Islamic brotherhood teaches us this lofty lesson.

عن سالم عن أبيه، عبد الله بن عمر رضي الله عنه أن رسول الله صلى الله عليه وسلم قال: المسلم أخو المسلم لا يظلمه ولا يسلمه ومن كان في حاجة أخيه كان الله في حاجته، ومن فرج عن مسلم كربة فرج الله بها كربة من كرب يوم القيامة ومن ستر مسلماً ستره الله يوم القيامة. (رواه مسلم: ٢/٣٢٠)

Rasūlullāh sallallāhu ʿalayhi wa sallam said: "A Muslim is a brother of another Muslim. He neither wrongs him nor hands him over to the enemy. Whoever fulfils the need of a Muslim, Allāh taʿālā will fulfil his need. Whoever removes a difficulty from a Muslim, Allāh taʿālā will remove from him one of the difficulties of the day of Resurrection. Whoever conceals [the fault of] a Muslim, Allāh taʿālā will conceal his fault on the day of Resurrection."

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[1] Sūrah al-Qasas, 28: 17.

[2] *Maʿārif al-Qur'ān*, vol. 3, p. 25.

عن أبي موسى الأشعري رضي الله عنه المؤمن للمؤمن كالبنيان يشد بعضه بعضاً. (رواه البخارى: ٨٩٠/٢)

A believer is like a building to another believer, each one strengthens the other.

عن النعمان بن بشير رضي الله عنه مثل المؤمنين في توادهم وتراحمهم وتعاطفهم مثل جسد إن اشتكى عضو منه تداعى له سائرالجسد بالسهر والحمى. (صحيح مسلم: ٣٢١/٢)

Rasūlullāh sallallāhu ʿalayhi wa sallam said: "The similitude of the believers in their love for each other, their mercy for each other and their affection towards each other is like that of a body. When one part of the body experiences pain, the entire body responds with restlessness and fever."

Observe the texts of the jurists:

قال ويكره بيع السلاح في أيام الفتنة معناه ممن يعرف أنه من أهل الفتنة لأنه تسبيب إلى المعصية وقد بيناه فى السير. (الهداية: ٤٧٢/٣. وكذا فى رد المحتار: ٣٩١/٦، كتاب الكراهية، سعيد)

ولا ينبغي أن يباع السلاح من أهل الحرب ولا يجهز إليهم لأن النبي صلى الله عليه وسلم نهى عن بيع السلاح من أهل الحرب وحمله إليهم، ولأن فيه تقويتهم على قتال المسلمين فيمنع من ذلك وكذا الكراع لما بينا وكذلك الحديد لأنه أصل السلاح وكذا بعد الموادعة لأنها على شرف النقض أو الانقضاء فكانوا حرباً علينا. (قوله ولا يجهز إليهم) مع التجار إلى دار الحرب. وفى العناية: قوله (ولا يجهز اليهم)أى لا يبعث التجار إليهم بالجهاز وهو فاخر المتاع، والمراد به هاهنا السلاح والكراع والحديد. (الهداية مع فتح القدير والعناية: ٤٦٠/٥، كتاب السير، دار الفكر)

Allāh taʿālā knows best.

Trading in slaughtered un-tanned animal skins

<u>Question</u>

A factory receives skins of animals which have been slaughtered. But the identity of the slaughterers in unknown – whether they are Muslims or not. These skins are not tanned. Is it permissible to trade in these skins? If an animal is not slaughtered in the Sharīʿah manner, is its skin pure?

What is the ruling if animals are slaughtered by non-Muslims and a Muslim sells their meat for the consumption of dogs, cats, lions, etc.?

<u>Answer</u>

If an animal is slaughtered in a manner which does not comply with the Sharīʿah, then will its meat be pure or not? The jurists differ in this regard. The majority say that it will not be pure; it will remain impure. Some scholars say that it will be pure. Mullā ʿAlī Qārī says in *Sharh Niqāyah* (with regard to the meat of an animal which is not consumed but slaughtered in the Sharīʿah manner): The view that it is pure is the preferred view of Imām Karkhī, the author of *al-Hidāyah*, the author of *Tuhfah*, the author of *Muhīt*, the author of *Badā'iʿ* and others. Based on this, it ought to be permissible to trade in the meat of the above-mentioned slaughtered animals.

<u>فتح باب العناية:</u>

قوله وكذا (أى طهر) لحمه وإن لم يؤكل) لأن الجلد يطهر بالذكاة اتفاقاً، واللحم متصل به فلا يكون نجساً، وهو مختار الكرخى، وصاحب الهداية والتحفة وفى المحيط: وهو الصحيح من المذهب، وفى البدائع: وهو أقرب إلى الصواب، لأن النجاسة بالدم المسفوح وقد زال بالذكاة، وقال كثير من المشايخ: يطهر جلده بها ولا يطهر لحمه. (فتح باب العناية: ٨٣/١، احكام الدباغة، بيروت)

<u>البناية فى شرح الهداية:</u>

(وكذلک يطهر لحمه) أى لحم ما ذكى حتى اذا صلى ومعه من لحم الثعلب المذبوح أو نحوه أكثر من قدر الدرهم جازت صلاته (هو الصحيح) أى الحكم بطهارة لحمه هو الصحيح، واحترز به قال فى الأسرار وغيره أنه نجس قلت:

وقد اختلف أصحابنا في طهارة لحمه وشحمه، فقال الكرخي: كل حيوان يطهر جلده بالدباغ يطهر بالذكاة فهذا يدل على أنه يطهر شحمه ولحمه وسائر أجزاءه، وقال بعض مشائخنا: يطهر جلده لا غير منهم نصر بن يحي والفقيه أبو جعفر والأول أقرب إلى الصواب، وقال فى المفيد هو الصحيح. (البناية فى شرح الهداية: ٢٣٣/١، ط: فيصل آباد)

الفتاوى الهندية:

وفي فتاوىٰ أهل سمرقند: إذا ذبح كلبه وباع لحمه جاز، وكذا إذا ذبح حماراً وباع لحمه وهذا فصل اختلف المشايخ فيه بناء على اختلافهم في طهارة هذا اللحم بعد الذبح واختيار الصدر الشهيد على طهارته... ويجوز بيع لحوم السباع والحمر المذبوحة فى الرواية الصحيحة، ولا يجوز بيع لحوم السباع الميتة كذا في محيط السرخسي. (الفتاوى الهندية: ١١٥/٣)

Hadrat Hakīmul Ummat rahimahullāh writes in *Bahishtī Zewar*:

It is permissible to trade in dead animals which are pure, e.g. aquatic animals, insects which do not have flowing blood, animals with flowing blood but after they have been slaughtered. This is because every animal except a pig becomes pure when it is slaughtered.[1]

Apart from pigs, all animals which have flowing blood – whether consuming their meat is lawful or not – become pure once they are slaughtered in the Sharī'ah manner. In other words, all their body parts – meat, fat, intestines, etc. – become pure, except for flowing blood [it remains impure]. This means that they can be used externally, e.g. bandaging these parts around the head. Yes, it is not permissible to consume those parts. Only halāl animals are to be consumed.[2]

The crux of the above is that apart from pigs, all animals become pure after they have been slaughtered. It is permissible to trade in them. Yes, apart from halāl animals, it is not permissible to consume them.

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[1] *Bahishtī Zewar*, vol. 9, p. 103.

[2] Ibid. p. 105.

ʿAllāmah Akmal ad-Dīn Bābartī ra<u>h</u>imahullāh and ʿAllāmah ʿAynī ra<u>h</u>imahullāh have responded to the opposing view. Refer to the following for details:

شرح العناية على الهداية بهامش فتح القدير مع الفتح: ١/٩٥-٩٦، دار الفكر. والبناية فى شرح الهداية: ١/٢٣٣. وفتاوىٰ شامى: ١/٢٠٥، سعيد. ومجمع النهر شرح ملتقى الابحر: ١/٦١، تحت الماء المستعمل. وحاشية الطحطاوى على مراقى الفلاح، ص ١٦٩. وخلاصة الفتاوىٰ: ١/٤٣، احكام الدباغة، والجوهرة النيرة: ١/١٧، ملتان. والفتاوى الولوالجية: ١/٤٦، الفصل الثانى، بيروت. وامداد الفتاح، ص١٧٠، بيروت)

One more point needs to be pondered over. When we refer to slaughtering an animal, does it refer to slaughtering it in the Sharīʿah manner or are animals slaughtered by non-Muslims also pure? Also, if an animal was not slaughtered in the Sharīʿah manner, but its blood flowed out completely, will its meat be pure?

Here too, the jurists have opposing views, and both have been ratified. Since the question is related to trading, there will be room for this. It is similar to crayfish which is not consumed but it is permissible to trade in it.

قوله الشرعية، نقل فى البحر من كتاب الطهارة عن الدراية والمجتبى والقنية أن ذبح المجوسى، وتارك التسمية عمداً يوجب الطهارة على الأصح وإن لم يؤكل، وأفاد فى التنوير أن اشتراط الذكاة الشرعية هو الأظهر وإن صحح المقابل. (حاشية الطحطاوى على مراقى الفلاح، ص ١٦٩، كتاب الطهارة، قديمى)

<u>البناية:</u>

وفى القنية: قال الكرابيسى والقاضى عبد الجبار: مجوسي ذبح حماراً قيل لا يطهر والصحيح أنه يطهر. (البناية: ١/٢٣٣)

الدر المختار:

(وہل يشترط كون ذكاته شرعية) بأن تكون من الأہل فی المحل بالتسمية (قيل نعم، وقيل لا، والأول أظہر)، لأن ذبح المجوسي وتارک التسمية عمداً كلا ذبح (وإن صحح الثاني)صححہ الزاہدي فی القنية والمجتبی، وأقره فی البحر. وفی رد المحتار: قولہ وأقره فی البحر، حيث ذكر أنہ فی المعراج نقل عن المجتبی والقنية تصحيح الثاني، ثم قال: وصاحب القنية ہو صاحب المجتبی، وہو الإمام الزاہدی المشہور علمہ وفقہہ، ويدل علی أن ہذا ہو الأصح أن صاحب النہاية ذكر ہذا الشرط أی كون الذكاة شرعية بصيغة قيل معزياً إلی الخانية. (الدر المختار مع رد المحتار: ۲۰۵/۱، سعيد. وكذا فی حاشية الطحطاوی علی الدر المختار: ۱۱۳/۱، باب المياه، كوئٹہ)

Observe some parallels to the above ruling:

1. If *Bismillāh* was intentionally not read over an animal by a Shāfiʿī, and it is destroyed, then some jurists say that there is no compensation. However, erudite scholars say that compensation is compulsory. Refer to *Fatāwā Dār al-ʿUlūm Zakarīyyā*, vol. 4, pp. 618-619. And a compensation is similar to trade. Our jurists furnish the proof of compensation which has to be paid in the trade of a hunting dog when it destroys something.

الكلاب التي ينتفع بها يجوز بيعها ويباح أثمانها... ثم عندنا لا فرق بين المعلم وغير المعلم في رواية الأصول، فيجوز بيعہ كيف ما كان، وروي عن أبي يوسف أنہ قال: لا يجوز بيع الكلب العقور، كما روي عن أبي حنيفة فيہ، ثم علی أصلہم يجب قيمتہ علی قاتلہ، واحتجوا بما روي عن عثمان بن عفان رضي الله عنه أنہ أغرم رجلاً ثمن كلب قتلہ عشرين بعيراً، وبما روي عن عمرو بن العاص رضي الله عنه أنہ قضی في كلب صيد قتلہ رجل بأربعين درہماً، وقضی في كلب ماشية بكبش. (عمدة القاری: ۵۷٤/۸، ط: ملتان)

2. We learn from the texts of the jurists that carrion cannot be fed to a cat, dog, etc. but they can be let loose in a place where there is carrion so that they could go and eat it on their own.

قال فى الفتاوى البزازية: ولا يحمل الجيفة إلى الهرة ويحمل الهرة إلى الجيفة. (الفتاوى البزازية: ٨٢/٤)

<u>نفع المفتى والسائل:</u>

ثم إن كان لا بد من سقي الخمر فرساً لا يشربه بل يضع الخمر بين يديه ليشربه ،كما أن لا ينبغي أن يؤكل الميتة الكلب إلا بأن يضع الميتة بين يدى الكلب، فيأكله بنفسه كما فى مطالب المؤمنين. (نفع المفتى والسائل، باب ما يتعلق بالحيوانات، ص ٤٧٢، بيروت)

<u>المحيط البرهانى:</u>

رجل له امرأة ذمية أو أب ذمي ليس له أن يقوده إلى البيعة، وله أن يقوده من البيعة إلى منزله، لأن الذهاب إلى البيعة معصية وإلى المنزل لا، ولا يحمل الخمر إلى الخل ولكن يحمل الخل إليها، وكذلك لا يحمل الجيفة إلى الهرة ويحمل الهرة إلى الجيفة. (المحيط البرهانى: ١٠٣/٦، فصل فى معاملة اهل الذمة، كتاب الاستحسان، رشيدية)

Certain jurists say that impure water can be given to animals to drink

وفى الذخيرة: ولا بأس برش الماء النجس فى الطريق ولا يسقى للبهائم وفي خزانة الفتاوىٰ: ولا بأس بأن يسقى الماء النجس للبقر والإبل والغنم. (البحر الرائق: ١٢٥/١، كوئته)

A fatwā could be issued on the second view at the time of necessity. The first view will be classified as makrūh. This, bearing in mind that the second view is supported by a <u>H</u>adīth:

A narration of *Sa<u>h</u>ī<u>h</u> Bukhārī* states that Rasūlullāh <u>s</u>allallāhu ʿalayhi wa sallam reached the place which had been inhabited by the Thamūd

nation. The Sahābah had used water from the wells of that place to make dough. Rasūlullāh sallallāhu ʿalayhi wa sallam ordered them to feed the dough to the camels. He did not say: "Go and place the dough at a distant place, and the camels will proceed their by themselves."

عن ابن عمر رضي الله عنه أن الناس نزلوا مع رسول الله صلى الله عليه أرض ثمود الحجر فاستقوا من بئرها واعتجنوا به، فأمرهم رسول الله صلى الله عليه وسلم أن يهريقوا ما استقوا من بئرها وأن يعلفوا الإبل العجين... الخ. (رواه البخارى: ٤٧٨/١)

Another Hadīth states: A woman invited Rasūlullāh sallallāhu ʿalayhi wa sallam to a meal. He accepted the invitation and he was chewing a morsel but it was not getting chewed. He asked: "Was this meat obtained without the permission of its owner?" The woman related that she had slaughtered her neighbour's goat without the latter's permission, and sent the money to the neighbour's house but the latter was not there. Rasūlullāh sallallāhu ʿalayhi wa sallam said: أطعميه الأسارى – feed the meat to the poor. (*Abū Dāwūd*, vol. 2, p. 117).

3. The jurists say with reference to unlawful wealth: If the owner is not known, it must be given as charity to the poor. We learn from this that wealth which is tainted can be given to the poor.

لأن سبيل الكسب الخبيث التصدق إذا تعذر الرد على صاحبه. (فتاوى الشامى: ٣٨٥/٦، سعيد)

Answers:

1. The jurists differ with regard to the skin and meat of an animal which was not slaughtered in the Sharīʿah way. Details in this regard were given above. The gist of which is that as per the most correct view, a Sharīʿah-prescribed manner of slaughtering is not necessary. In fact, ʿAllāmah Shāmī rahimahullāh says that the condition of non-Sharīʿah method of slaughter is mentioned in the passive voice (*qīla*), and this demonstrates the weakness of this view. Therefore, in the question under discussion, there is room for trading in skins which are tanned and un-tanned.

وقال الشيخ الشلبي في حاشية التبيين: وفى القنية قال الكرابيسى والقاضى عبد الجبار مجوسي ذبح حماراً قيل لا يطهر والصحيح أنه يطهر. (حاشية تبيين الحقائق: ١/٢٦، ط: ملتان)

ʿAllāmah Tahtāwī rahimahullāh writes:

قوله وأقره فى البحر، حيث ذكر أنه فى المعراج نقل عن المجتبى والقنية تصحيح الثاني، ثم قال: وصاحب القنية هو صاحب المجتبى، وهو الإمام الزاهدى المشهور علمه وفقهه، ويدل على أن هذا هو الأصح أن صاحب النهاية ذكر هذا الشرط أى كون الذكاة شرعية بصيغة قيل معزياً إلى فتاوى قاضيخان. (حاشية الطحطاوى على الدر المختار: ١/١١٣، باب المياه، كوئته. والدر المختار مع رد المحتار: ١/٢٠٥، سعيد)

Allāh taʿālā knows best.

Trading in saddles made of snake-skin

Question

We learn from the texts of the jurists that snake-skin does not become pure through tanning because it cannot be tanned. However, in today's times, if it is tanned by using chemicals, will it not become pure? Will it be permissible to trade in and sit on saddles made from such skins?

The method of tanning through chemicals is as follows:

Nowadays, snake-skin is generally used to make saddles. Chemicals are added to the skin and it is dried in this way. More chemicals are added to soften it. In this way, all the moisture is removed from the skin.

Answer

In explaining the reason behind the impurity of snake-skin after tanning, the jurists say that snake-skin cannot be tanned. However, if this can be done through chemicals, then the general ruling of the Hadīth will be applied to snake-skin. Therefore, it will be permissible to use and trade in items made of snake-skin. A Hadīth states:

كل إهاب دبغ فقد طهر.

Every skin which is tanned is pure.

قوله كل إهاب يتناول كل جلد يحتمل الدباغة. (البحر الرائق: ٩٩/١، كوئته)

فتح القدير:

وكل إهاب دبغ فقد طهر يتناول كل جلد يحتمل الدباغة لا ما لا يحتمله. (فتح القدير: ٩٢/١، دار الفكر)

Maulānā Khālid Sayfullāh Sāhib writes in *Qāmūs al-Fiqh:*

The Hanafī jurists generally state that the skins of snakes, rats, etc. are not usable because it is not possible to tan them. However, in today's times, it has become possible to tan small creatures, and they are usable once they are tanned. Imām Muhammad rahimahullāh said that if the testicles of a dead goat are tanned and made usable, they will become pure.[1]

Allāh taʿālā knows best.

Dealings with a non-Muslim who engages in unlawful business transactions

Question

A person does business with a non-Muslim, accepts gifts from him, or occasionally accepts an invitation to a meal from him. The non-Muslim does things which are unlawful to a Muslim. For example:

1. Invalid transactions – he imports goods from overseas and sells them before taking possession of them.
2. He sells alcohol. This is the major portion of his income.
3. He sells garments containing images of animate objects.
4. He is a barber. He cuts hair in a manner which is not in line with the Sharīʿah. He shaves the beards of his customers.
5. He is involved in gambling.
6. He sells musical instruments and musical recordings.

[1] *Qāmūs al-Fiqh*, vol. 3, p. 405.

If a Muslim sells an item to such a non-Muslim and accepts his money or accepts a gift from him, will this be permissible? This happens most of the time in non-Muslim countries.

Answer

If a Muslim does business with a non-Muslim as described above, and the transactions are correctly done, then it is permissible.

Maulānā Zafar Ahmad ʿUthmānī writes with reference to selling an item before taking possession of it:

If the buyer is a non-Muslim, there is no harm in doing business with him in this way.[1]

He writes in another place:

There is no objection to selling musical instruments to non-Muslims.

وفي بيعه أى المزمار مع الكفار لم تقم الحرمة بالعين ولا بالفعل فإن الكفار ليسوا مخاطبين بحرمة الغناء ولا هو حرام فى الأديان كلها. (امداد الاحكام: ٣٨٤/٣)

Allāh taʿālā knows best.

Bearing the cost of returning a defective item

Question

Zayd bought a heavy machine from ʿUmar. After buying it, Zayd found a defect in it which necessitated him to return the machine. Who will bear the cost of returning the machine, Zayd or ʿUmar?

Answer

If the buyer came to know of an old defect and wants to return the machine, the buyer [ʿUmar] will have to bear the cost of transport.

البحر الرائق:

تنبيهات مهمة: الأول: وجد بالمبيع الذي له حمل ومؤنة عيباً ورده فمؤنة الرد على المشترى. (البحر الرائق: ٣٧/٦، كوئته)

[1] *Imdād al-Ahkām*, vol. 3, p. 410.

الفتاوى البزازية:

وجد بالمبيع الذي له حمل ومؤنة عيباً ورده فمؤنة الرد على المشترى. (الفتاوى البزازية على هامش الهندية: ٤/٤٤٧)

المحيط البرهانى:

وفى المحيط البرهاني: وفى المنتقى: اشترى من آخر تمراً بالري وحمله إلى الكوفة ثم اطلع على عيب هناک فإن أراد أن يرده قال محمد: ليس له ذلک حتى يرده إلى ذلک الموضع علل فقال: لأن لحمله مؤنة. (المحيط البرهانى: ٣٠/٨، فصل فى العيوب، رشيدية)

We learn from the above text that since it is the responsibility of the buyer to convey the item to the seller, the cost of transporting it will also have to borne by the buyer.

Allāh taʿālā knows best.

When the second buyer is asked to pay the full amount

Question

Two persons bought a machine whose payment is due after one month. One of the buyers disappeared. At the end of the specified period, the seller is demanding payment. How can the second buyer acquire the machine?

Answer

Since the seller is not prepared to hand over the machine until he receives the full amount, the second buyer must pay the full amount and take possession of the machine. When the first buyer returns, he must collect half the money which was paid for the machine, and then give over his share to him.

الدر المختار:

وإن اشترى اثنان شيئاً وغاب واحد منهما فللحاضر دفع كل ثمنه ويجبر البائع على قبول الكل ودفع الكل للحاضر وله قبضه وحبسه عن شريكه إذا حضر حتى ينقد شريكه الثمن بخلاف المستاجرين. (الدر المختار: ٣٣١/٥، سعيد)

تبيين الحقائق:

ولو غاب أحد الشريكين للحاضر دفع كل الثمن وقبضه وحبسه حتى ينقد شريكه يعني إذا اشترى رجلان فغاب أحدهما قبل القبض يكون للحاضر دفع كل الثمن وقبضه كله ثم إذا حضر شريكه فله أن يحبسه عنه حتى ينقده. (تبيين الحقائق: ١٢٩/٤، ملتان)

(شرح العناية: ١٢٧/٧، والبحر الرائق: ١٧٠/٦، وفتح القدير: ١٢٧/٧، والبناية: ٢١١/٣)

Allāh taʿālā knows best.

Laying down an invalid condition with a non-Muslim

Question

A person bought a church which would be used as a madrasah for children. Some conditions were laid down, e.g. changes and alterations to the church may be made inside only. No changes can be made to it on the outside. It is an ancient church and its old appearance has to be maintained. The grave of the founder of this church is within the boundaries of the church. A high wall may be constructed around it so that no one can see the grave. Bearing in mind the importance of the church, the buyer accepted these conditions with the intention that at least a building which was inviting towards falsehood will now be used for the sake of Islam. The importance of this church and the objections made by some Christians caused this entire affair to be reported in the newspapers. A muftī issued a fatwā that because of the invalid conditions, the entire transaction is invalid. It is obligatory to return it. We request a fatwā from your Dār al-Iftā'.

Answer

The rule of the Sharī'ah is that when invalid conditions are made, the transaction becomes invalid. However, this applies to the mutual dealings among Muslims. If such a transaction is entered into with a non-Muslim, it will not be invalid. Hadrat Maulānā Zafar Ahmad 'Uthmānī rahimahullāh writes in *Imdād al-Ahkām* in response to a question on selling an item before taking possession of it. He says that this is impermissible because it entails the sale of something which is non-existent or before taking possession of it. And both are invalid. Yes, if the buyer is a non-Muslim, there is no objection to such a transaction with him.[1]

He writes in another place:

There is no objection to selling musical instruments to non-Muslims.

وفي بيعه أى المزمار مع الكفار لم تقم الحرمة بالعين ولا بالفعل فإن الكفار ليسوا مخاطبين بحرمة الغناء ولا هو حرام فى الأديان كلها. (امداد الاحكام: ٣/٣٨٤)

Allāh ta'ālā knows best.

A motorcycle and 'umrah welfare scheme

Question

A motorcycle retailer has a scheme wherein the buyer will purchase a motorcycle on instalments. A lot will be drawn, and the person whose name comes out will receive the motorcycle in return for the instalments which he already paid, and the remaining instalments will fall away. When the lot is drawn, some participants will also receive an 'umrah ticket. Certain muftīs say that this deal is impermissible. Some of the reasons which they furnish are as follows:

1. If it is bay' as-salam, the buyer ought to have paid the entire amount in the beginning. Here he paid the amount in instalments.

2. The price is unspecified; it is one price for one person and a different price for another.

3. If the amount which he paid is not the price, and is instead a trust (amānah), and the company has the permission to use it; then this will

[1] *Imdād al-Ahkām*, vol. 3, p. 410.

become a debt. Based on this, where a lot is drawn, the buyer who is a debtor in this case, has received a discount. It will then fall under the principle: كل قرض جر نفعا فهو ربا (a debt which draws profits is usury).

What is your verdict in this regard?

<u>Answer</u>

I am of the view that this scheme is permissible. There are two ways of making it valid.

(1)

The instalments must be given as a trust (amānah) and the seller must be given permission to use it as he wants. This will become a loan. In the case where a lot is drawn, the same instalments will become the price. As for the principle: كل قرض جر نفعا فهو ربا (a loan which draws profits is usury), this applies to where the profit is preconditioned and known to both parties. It is unlawful. Where the profit is envisaged, it is not unlawful. In this case, the profit is envisaged, it is not known to either party.

The chief muftī of Dār al-'Ulūm Deoband, Hadrat Muftī Nizām ad-Dīn Sāhib rahimahullāh writes in *Nizām al-Fatāwā*:

Question: What do the 'ulamā' say about the following. The post office has a scheme where a person deposits one pound, five pounds, or whatever amount; and receives a receipt for the deposit. He can withdraw the money whenever he wants when he produces the receipt. Every month, the newspapers publish certain numbers, where a person who deposited one pound, receives one hundred pounds. Is it permissible for a person to accept the amount which is more than what he deposited?

Answer: ...Hadrat Muftī Sāhib rahimahullāh said that it is permissible. We are quoting one portion of his answer: There is no certainty in receiving the extra amount, the person cannot demand the extra amount, and everyone does not receive the extra amount. Rather, the post office merely announces the distribution of the extra amount according to whatever rules it has laid down, and as per the numbers [of the receipts] which are announced. One of the persons whose name appears receives the extra amount. No one else has the right to demand it.

Hadrat Muftī Sāhib rahimahullāh writes further on: Someone may say that the extra amount is only given to the one who gave the loan, therefore the profit was drawn by the loan, and it be classified as: كل

قرض جر نفعا فهو ربا (a loan which draws profits is usury). The answer to this objection is that the extra amount is not given to every person who gives the loan (makes the deposit); the post office only gives to whomever it wants. If the name of a person who had made a deposit does not come out, and he demands the extra amount, he will have no right to demand it as per the original agreement. This profit can therefore not be classified as "a loan which draws profits". ʿAllāmah Shāmī ra<u>h</u>imahullāh says in this regard:

إذا كان مشروطاً كما علم مما نقله عن البحر و من الخلاصة وفى الذخيرة: إن لم يكن النفع مشروطاً فى القرض فعلى قول الكرخى لا بأس به.

Further on he explains the difference between جرّ and انجرّ.[1]

Muftī Rashīd A<u>h</u>mad Ludhyānwī ra<u>h</u>imahullāh writes:

In order to increase its sales, a motorcycle company has initiated a scheme where it sells a motorcycle on instalments. It has laid down twenty-one instalments with a monthly instalment of 550 rupees. If, before completing the instalments, a person's name comes out in a draw, the motorcycle is given to him and the remaining instalments fall away. The draw is held monthly. If a person's name does not come out in the draw for twenty months, he is given the motorcycle in the twenty-first month. The amount of the twenty-one instalments is the same as what a motorcycle sells for in the market. It is not priced higher than normal. Is this transaction permissible?

Answer: This is a discount from the company's side. It can give a discount to a buyer through drawing a lot. It does not entail a loss to anyone. This transaction is therefore permissible. Allāh taʿālā knows best.[2]

We learn from the above that the entire amount is not unknown; it is known. Yes, by drawing a lot, some peoples' remaining instalments are pardoned. The full amount must be shown in the advertisement. And that the remaining instalments of some people are pardoned.

<u>H</u>a<u>d</u>rat Muftī Ni<u>z</u>ām ad-Dīn <u>S</u>ā<u>h</u>ib ra<u>h</u>imahullāh was asked the following question:

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[1] *Ni<u>z</u>ām al-Fatāwā*, vol. 1, pp. 194-195.

[2] *A<u>h</u>san al-Fatāwā*, vol. 6, p. 518.

A person wants to advertise his business so he adopts the following scheme. A watch is normally valued at one hundred rupees. He gets fifty members who will contribute ten rupees every month for ten months. In the first month, the person whose name is drawn from the lot will receive the watch for ten rupees. This will continue for the next nine months. Whichever person's name is drawn will receive a watch. In the tenth month, there are forty-one persons remaining. Each one will receive a watch and the scheme will terminate in this way. Is this permissible?

Hadrat Muftī Sāhib rahimahullāh replied that this scheme is permissible on the condition that if any of the participants passes away before he can receive his watch, the instalments which he paid are returned. This is the gist of the question and answer.[1]

Muftī Khālid Sayfullāh Sāhib had initially stated that this scheme is invalid, but he retracted and said that it is permissible. (*Jadīd Fiqhī Masā'il*, vol. 4, p. 166) He initially said that it is invalid because the price was unknown, whereas here, the original price is not unknown. Yes, later on, the remaining amount is pardoned through the drawing of lots.

To sum up, the profit is not preconditioned for every person who is party to the transaction. Rather, it is dependent on the drawing of lots. This is referred to as *tabarruʿ-e-mashrūt* (a preconditioned donation). In other words, if the person's name comes out in the draw, the remaining instalments will be pardoned. And *tabarruʿ-e-mashrūt* is permissible. There are many examples for it in the Sharīʿah. Hadrat Abū Bakr radiyallāhu ʿanhu bought a palanquin for a camel from Hadrat ʿĀzib radiyallāhu ʿanhu and said to him: "Tell your son, Barrā', to take this palanquin with me." Hadrat ʿĀzib radiyallāhu ʿanhu said: "He will take it on condition that you relate the story of the Hijrah." Hadrat ʿĀzib radiyallāhu ʿanhu preconditioned the favour of carrying the palanquin with relating the story of the Hijrah, and Hadrat Abū Bakr radiyallāhu ʿanhu accepted the condition of relating the story.

Imdād al-Ahkām states: The admission fees and monthly fees which are charged by madāris are not rental payments; they are donations. And it is permissible to make a condition in donations.[2]

Observe details about this issue in Kitāb al-Hibah, under the heading *tabarruʿ mashrūt*:

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[1] *Nizām al-Fatāwā*, vol. 2, p. 319.

[2] *Imdād al-Ahkām*, vol. 3, p. 623.

A simple definition of *tabarruʿ-e-mashrūṭ*: To make a condition in a favour which is done to another. For example, laying down the condition of drawing lots for instalment-payments.

(2)

The second way in which this transaction can be validated is to consider it as *istiṣnāʿ* and not *salam*. This must be clearly stated in the advertisement. The fundamental reason for not classifying it as *salam* is that in *salam*, it is necessary to give the capital amount and to specify the time period. And here the capital amount is given in instalments.

بدائع الصنائع:

أما الذي يرجع إلى رأس المال... ومنها: أن يكون مقبوضاً في مجلس السلم لأن المسلم فيه دين والافتراق لا عن قبض رأس المال يكون افتراقاً عن دين بدين... ولأن مأخذ هذا العقد دليل على هذا الشرط فإنه يسمى سلماً وسلفاً.. والسلف ينبئ عن التقدم فيقتضي لزوم تسليم رأس المال. (بدائع الصنائع: ٢٠٢/٥، سعيد)

تبيين الحقائق:

فإن أسلم في مائتي درهم في كر بر مائة دين عليه ومائة نقد فالسلم فى الدين باطل أى في حصة الدين لأنه دين بدين. (تبيين الحقائق: ١١٨/٤، امداديه)

However, in the case of *istiṣnāʿ*, it is not necessary to give the entire amount immediately. The following is stated in *al-Majallah*:

لا يلزم فى الاستصناع دفع الثمن حالاً لأن هذا بيع والمستصنع مشترٍ والمشترى لا يلزمه دفع الثمن قبل إحضار المبيع. (مجلة وشرح المجلة لمحمد خالد الاتاسى: ٤٠٥/٢، باب الاستصناع)

A simple translation of *istiṣnāʿ* is: to order an item or book an item. It is not necessary for the item to be manufactured later on. Rather, even an item which was manufactured before hand can be given to the person who placed the order. As stated in the books of jurisprudence.

Allāh taʿālā knows best.

PROFIT-SHARING AND BANKS

An objection to a profit-sharing contract of a banking institution

Question

We have some non-interest banks which operate on a profit-sharing basis. This is how they work: Zayd needs to buy some goods but he requests a bank to pay for them by entering into a murābahah (profit-sharing) contract with him. After making its investigations, the bank gives him the agreement papers. Zayd goes to a business or factory. The required goods are purchased for R100 000.00 by the bank's representative or Zayd buys them on behalf of the bank. He then buys the same goods from the bank for R130 000.00 as a deferred price. Is this contract permissible? Some 'ulamā' raise objections to it. Two objections need attention:

1. If a representative of the bank made the purchase, then there seems to be no major objection to it. However, if Zayd made the purchase on behalf of the bank and then becomes the buyer of the goods himself, then his first qabdah is qabd amānat as a representative and trustee, and the qabdah with respect to himself is qabd damān or qabd mu'āwadah. In such a case, a qabd amānat cannot take the place of a qabd mu'āwadah.

2. The second objection is that if Zayd is a representative for the purchase and also becomes the buyer by becoming the representative for the sale, it would mean that one person will become the seller and the buyer. And this is prohibited according to the jurists. To put it in another way, Zayd is the *asīl* (buyer) and the *wakīl* (representative for the sale). To put it in yet another way, Zayd is *matālib-e-thaman* and *matlūb bi ath-thaman*. How can the two be combined?

'Allāmah Shāmī rahimahullāh says:

الوكيل بالبيع لا يملك شراءه لنفسه لأن الواحد لا يكون مشترياً وبائعاً فيبيعه من غيره ثم يشتريه منه. (فتاوى الشامى: ٥/٥٢١، سعيد)

Answer

1. A qabdah amānat cannot take the place of a qabdah damān because the first one is classified as weak while the second is classified as strong. And something which is weak cannot take the place of something which is strong. Yes, if a person exercises his will over a qabdah amānat, then it automatically becomes a qabdah damān. In the

case where the item is destroyed or damaged, the buyer will be liable to pay compensation.

In short, where the person exercises his will, the qabdah amānat automatically becomes a qabdah damān. Yes, had the qabdah amānat not become a qabdah damān, then where it is damaged or destroyed, the bank which is the seller would have to pay compensation. But in the case where the person exercises his will over the item or moves it around, the buyer will have to pay compensation. In other words, the issue of a qabdah amānat not taking the place of a qabdah damān is connected to damān – that is, who will pay compensation if the item is damaged or destroyed. This is not an issue of halāl and harām. Yes, the buyer can make an agreement with the bank or makes a verbal statement: "If the item is destroyed or damaged before I exercise my will over it, the bank will be responsible."

بخلاف ما لو باع الأمانة ممن هي عنده فإنه لا ينوب قبض الأمانة عن قبض البيع لأن قبض البيع قبض الضمان وقبض الأمانة دونه فلا ينوب عنه بل لا بد من تجديد القبض بأن يخلى بين نفسه وبين الأمانة المبيعة بعد العقد. (شرح القواعد الفقهية للشيخ احمد بن الشيخ محمد الزرقا، ص ٣٠١)

الهداية:

وإن كان له مال في يد أجنبي فأنفق عليهما بغير إذن القاضي ضمن لأنه تصرف في مال الغير بغير ولاية لأنه نائب فى الحفظ لا غير، بخلاف ما إذا أمره القاضي لأن أمره ملزم لعموم ولايته، وإذا ضمن لا يرجع على القابض لأنه ملكه بالضمان فظهر أنه كان متبرعاً به. (الهداية، باب النفقة، ٤٤٨/٢)

Jadīd Fiqhī Mabāhith:

The first qabdah which is as a representative has the status of an amānat (trust). The second qabdah with respect to himself is a qabdah damān. A second qabdah is only valid when the first one is of the same category. For example, if a person seizes the wealth of another, it is a qabdah damān. However, there are clear texts stating that if a transaction is concluded in the case of the qabdah amānat, the person reaches the goods or exercises his right of ownership over them, he would have taken qabdah of the goods with respect to himself. As for the issue which is causing objections, it stems from: If the first qabdah

is one of amānat, then it will not change to a qabdah damān on account of the sale itself. And if the first qabdah is also one of damān, it will become one's own qabdah on account of the sale.[1]

When a person exercises his will over a qabdah amānat, it changes into a qabdah damān:

ثم الخلط أنواع ثلاثة خلط يتعذر التمييز بعده كخلط الشيء بجنسه فهذا موجب للضمان لأنه يتعذر به على المالك الوصول إلى عين ملكه... وخلط يتعسر معه التمييز كخلط الحنطة بالشعير فهو موجب للضمان لأنه يتعذر على المالك الوصول إلى عين ملكه إلا بحرج... وإذا كان عند الرجل وديعة دراهم أو دنانير أو شيء من المكيل أو الموزون فأنفق طائفة منهما في حاجته كان ضامناً لما أنفق... فإن جاء بمثل ما أنفق فخلطه بالباقي صار ضامناً لجميعها لأن ما أنفق صار ديناً في ذمته وهو لا ينفرد بقضاء الدين بغير محضر من صاحبه فيكون فعله هذا خلطاً لما بقي بملك نفسه وذلك موجب للضمان عليه. (المبسوط للامام السرخسى، ١١/١١٠،١١١، كتاب الوديعة، ادارة القرآن)

Ta'līfāt Rashīdīyyah:

It is not permissible for a trustee to exercise his will...if he does, he will become liable.[2]

If an animal was given for safe-keeping to a person and it dies while he was riding it, he will have to pay compensation.

'Allāmah 'Aynī rahimahullāh writes:

لأن الضمان وجب عليه بنفس الركوب حتى لو هلك في حالة الاستعمال يضمن بلا خلاف. (حاشية هداية: ٣/٢٧٢)

We learn that riding an animal which was given for safe-keeping or wearing clothes which were given for the same purpose causes the qabd amānat to change into a qabd damān. This is why the jurists

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[1] *Jadīd Fiqhī Mabāhith*, vol. 3, pp. 427-428 as quoted from *al-Bahr ar-Rā'iq*, vol. 6, p. 86 and *Radd al-Muhtār*, vol. 4, p. 112.

[2] *Ta'līfāt Rashīdīyyah*, p. 431.

classify the lending of dirhams for the sake of spending as a loan. (*al-Hidāyah*, vol. 3, p. 279) Spending borrowed dirhams automatically causes them to become a loan which has to be paid back.

Hadrat Thānwī rahimahullāh writes:

When an amānat is given while permitting the trustee to spend it, it becomes a loan even if the person did not will it so.[1]

When money is deposited in a bank for safe-keeping, then although it is called a deposit, it is a well-known fact that the same money is not kept aside. Rather, the bank does business with it. Thus, based on the principle – *al-maʿrūf ka al-mashrūt* (an accepted norm is like a precondition), the bank exercising its will over the deposit will be classified as a permission granted to it by the depositor. And giving permission to exercise one's will turns it into a loan.[2]

وللاستزادة انظر: فتاوى الشامى: ٥/٦٦٨-٦٧٠، كتاب الايداع، سعيد. وحاشية الطحطاوى على الدر المختار: ٣/٣٧٩، كوئتة)

Objection: There is one objection to this issue. A person becomes a sinner when he exercises his will over an item which was entrusted to him. Why, then, has he been given the permission to exercise his will over it?

Answer: The owner has agreed to the trustee exercising his will, so he will not be sinning.

2. The answer to the second objection [mentioned at the beginning of the question] is that ʿAllāmah Shāmī rahimahullāh mentions a view which states that the representative may buy the item for himself under the instruction of the one who appointed him. In other words, it will also be permissible for him to become the seller and buyer at one and the same time.

وإن أمره المؤكل أن يبيعه من نفسه وأولاده الصغار أو ممن لا يقبل شهادته فباع منهم جاز بزازية كذا فى البحر، ولا يخفى ما بينهما من المخالفة، وذكر مثل ما فى السراج فى النهاية عن المبسوط، ومثل ما فى البزازية فى الذخيرة عن

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[1] *Imdād al-Fatāwā*, vol. 3, p. 145.

[2] *Imdād al-Fatāwā*, vol. 2, p. 571.

الطحاوى، وكأن فى المسألة قولين خلافاً لمن ادعى أنه لا مخالفة بينهما. (فتاوى الشامى: ٥/٥٢٢، سعيد. وكذا فى البحر الرائق: ٧/١٦٧، كوئته)

A fatwā can be issued on this statement of ʿAllāmah Shāmī rahimahullāh to save people from the curse of usury. Obviously, it will be best if the bank appoints someone else as its representative for the sale.

To summarize the above: If the item is destroyed before the buyer can exercise his will over it, the bank will be responsible. If it is destroyed after the buyer exercises his will over it, the buyer will have to pay compensation.

Allāh taʿālā knows best.

A second objection to profit-sharing agreements with banks and the reality of legal stratagems

Question

The fundamental objective and essence of a profit-sharing contract with a bank is this: The bank gives R100 000.00 to Zayd and will collect R150 000.00 from him. This is clearly interest. How can it be correct to resort to a profit-sharing contract to make this permissible?

Answer

The objective of Zayd (the buyer) is not to procure a loan. Rather, he needs to buy a machine for which he does not have the money. There are two ways he can acquire the machine: (1) He takes a loan and pays an additional amount. He can then take the money and buy the machine. This is certainly interest. (2) He buys the machine through the bank on the basis of murābahah. This second option is not interest but a way to avoid interest. When it comes to transactions and dealings, Rasūlullāh sallallāhu ʿalayhi wa sallam himself taught measures of this nature. There is a well-known incident of a Sahābī who bought one kilo [the weight was actually called a sāʿ, but we are naming it a kilo to make it easy for us to understand] of superior quality dates in exchange for two kilos of inferior quality dates. Rasūlullāh sallallāhu ʿalayhi wa sallam referred to it as interest and showed him how to save himself from this sin. He asked him to sell the two kilos of dates for dirhams. In exchange for the dirhams which the buyer is duty-bound to pay, he must purchase a kilo of superior quality dates. The essence of both transactions is the same, but when this measure was adopted, the transaction became permissible.

Types of legal stratagems

Every hīlah (legal stratagem) is not impermissible. A hīlah whose objective it is to invalidate a Sharīʿah injunction or trample on someone's rights is impermissible according to the Sharīʿah. For example, a person tries to invalidate the order of zakāh on himself by handing over all his wealth to his wife before the expiry of one lunar year. Then before the expiry of the next lunar year, the wife gives over all the wealth to her husband. The objective of this stratagem is to invalidate an injunction of the Sharīʿah and to deny the poor their dues. This hīlah is therefore unlawful.

Take the example of the fishing which was prohibited to the Banī Isrā'īl on Saturdays. The purpose of this order was to prohibit them from making Saturdays a means of acquiring fish. However, they used to gather the fish in various ponds by causing them to swim into them on Saturdays, and sealing off the exits so they could not swim out. They would then catch the fish on Sundays. This was a stratagem to legalize fishing, but it was synonymous to invalidating an injunction of the Sharīʿah because Saturday had become a means for fishing. (According to some scholars, they were even prohibited from sealing off the exit points).

Take another example: A person is prohibited from raising his hand against another, so he resorts to kicking him. The objective is obviously lost.

Fat was made unlawful to the Jews, as related in *Sahīh Bukhārī*. So they began selling it after melting it. Since melting an item does not alter its fundamental nature and it is still fat, this stratagem was prohibited and unlawful.

There is no harm in a stratagem whose objective it is to save someone from what is unlawful.

فالحاصل أن ما يتخلص به الرجل من الحرام أو يتوصل به إلى الحلال من الحيل فهو حسن. (المبسوط للامام السرخسى: ٢٠٩/٣٠)

Similarly, the stratagem related to the above-mentioned incident of the dates of a Sahābī has been taught in the Hadīth. This is related by Imām Bukhārī and Imām Muslim rahimahumallāh.

A stratagem whose objective it is to save an innocent person is not prohibited. According to the exegists, when Hadrat Ayyūb ʿalayhis salām had taken an oath of lashing his wife, he was taught to strike her with the bristles of a broom so that his oath is fulfilled.

If the objective of a stratagem is to save a person's life, then it too is not impermissible. There was a physically weak person who had committed fornication. He could not have borne the lashing, so he was punished with a bundle of twigs and his life was saved.

Allāh taʿālā knows best.

Specifying a monthly profit in a profit-sharing contract

Question

Zayd bought a machine from ʿUmar for R1 000. This is how ʿUmar sold it: The actual price is R1 000, but Zayd will pay the price in instalments. ʿUmar will therefore take a profit of R200 per month. If he paid the five instalments from January to May, the price of the machine would have become R2 000. He therefore sold the machine at a deferred price of R2 000. He also said that if the buyer pays the full amount within two months, the price of the machine will be R1 400. Is such a transaction permissible?

Answer

This contract is essentially a murābahah contract and in such a contract, it is permissible to collect a monthly profit of R200. If Zayd pays it over five months, the price will become R2000. If it is paid within two months or the buyer passes away, the price will be R1400.

Islām Aur Jadīd Maʿāshī Masā'il:

A murābahah transaction entails the buyer paying an additional price in relation to the period over which he makes the payments. If this is mentioned clearly at the time of the transaction, then the verdict of latter-day Hanafī jurists is that if the debtor pays off his debt before the appointed time or passes away before that time, the seller will collect only that amount which will be in relation to the past days. He will have to leave out the price which was due in relation to the remaining days...The probable reason for the jurists saying this is that although a time-period does not have the capability of being an exchange, it is permissible to supplementarily and inclusively specify an amount in relation to the period. For example, it is not primarily permissible to sell the calf which is still in the womb of a cow, but there are occasions when it is permissible to collect something in exchange for it if it is done supplementarily.[1]

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[1] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 3, p. 118-120.

الدر المختار:

قضى المديون الدين المؤجل قبل حلول الأجل أو مات فحل بموته فأخذ من تركته لا يأخذ من المرابحة التي جرت بينهما إلا بقدر ما مضى من الأيام، وهو جواب المتأخرين، قنية، وبه أفتى المرحوم أبو السعود آفندي مفتي الروم، وعلله بالرفق للجانبين. وفى الشامية: قوله لا يأخذ من المرابحة، صورته اشترى شيئاً بعشرة نقداً وباعه لآخر بعشرين إلى أجل هو عشرة أشهر، فإذا قضاه بعد تمام خمسة أو مات بعدها يأخذ خمسة ويترك خمسة، أقول: والظاهر أن مثله ما لو أقرضه وباعه سلعة بثمن معلوم وأجل ذلك، فيحسب له من ثمن السلعة بقدر ما مضى فقط تأمل. (الدر المختار مع فتاوى الشامى: ٧٥٧/٦، قبيل كتاب الفرائض، سعيد)

فتح القدير:

(قوله وعلله) أى علله الحانوتي بالتباعد عن شبهة الربا لأنها في باب الربا ملحقة بالحقيقة، ووجهه أن الربح في مقابلة الأجل، لأن الأجل وإن لم يكن مالاً، ولا يقابله شيء من الثمن لكن اعتبروه مالاً فى المرابحة إذا ذكر الأجل بمقابلة زيادة الثمن، فلو أخذ كل الثمن قبل الحلول كان أخذه بلا عوض. (فتاوى الشامى: ٧٥٧/٦، قبيل كتاب الفرائض، سعيد)

وللاستزادة انظر:(فتح القدير: ١٣٣/٦، باب المرابحة والتولية، دار الفكر. والبحر الرائق: ١٤٤/٦، باب المرابحة والتولية، كوئته. والطحطاوى على الدر المختار: ٣٦٣/٤، كوئته)

Allāh ta'ālā knows best.

An objection to contemporary Islamic banking

Question

Certain people object to the following dealings of banks:

A person wants to purchase a vehicle but does not have the full amount. A non-interest bank buys the vehicle and rents it out to the customer over a long period – three to five years. When the bank specifies the monthly rental amount, it has in its mind that it will collect its money with some profit over the three-year period. After that, it sells the car to the rentee either for a paltry amount or gives it to him for free.

Some people object to this agreement by saying that because the vehicle is either sold or given to the rentee after the rental period, it is classified as *s̲afqah fī s̲afqah* which is prohibited in the H̲adīth. This transaction is therefore impermissible.

Answer

Because this type of agreement is quite common nowadays, there can be a leeway for it. The agreement will not be invalid on the basis of common practices of people and societal norms. This is because a common practice is attached to ijmāʿ (consensus).

The other answer is that separate agreements are recorded on separate documents. It will therefore be permissible.

Various definitions of *s̲afqah fī s̲afqah*:

قال الامام الترمذي: وقد فسر بعض أہل العلم قالوا: بيعتين في بيعة:

(١) أن يقول: أبيعک ہذا الثوب بنقد بعشرة وبنسيئة بعشرين، ولا يفارقہ على أحد البيعين، فإذا فارقہ على أحدہما، فلابأس، إذا كانت العقدة على واحد منہما، قال الشافعي: ومن معنى ما نہى النبي صلى الله عليہ وسلم عن بيعتين في بيعة:

(٢) أن يقول: أبيعک داري ہذه بكذا، على أن تبيعني غلامک بكذا، فإذا وجب لي غلامک وجبت لک داري، وہذا تفارق عن بيع بغير ثمن معلوم، ولا يدري كل واحد منہما على ما وقعت عليہ صفقتہ. (ترمذی شريف:١/٢٣٣، باب ما جاء فى النہى عن بيعتين فى بيعة)

(٣) أن يسلفہ ديناراً في قفيز حنطة إلى شہر فلما حل الأجل وطالبہ بالحنطة قال: بعنى القفيز الذي لک علي إلى شہرين بقفيزين فصار ذلک بيعتين في

بيعة، لأن البيع الثاني قد دخل على الأول فيرد إليه أوكسهما وهو الأول، كذا في شرح السنن لابن رسلان، فقد فسر حديث أبي هريرة رضي الله عنه المذكور، بلفظ: نهى رسول الله صلى الله عليه وسلم عن بيعتين في بيعة، بثلاثة تفاسير فاحفظها. (تحفة الاحوذى: ٣٢٦/٣)

وللاستزادة انظر: (بذل المجهود فى حل ابى داود: ١٣٥/١٥، باب فيمن باع بيعتين فى بيعة. وبداية المجتهد فى نهاية المقتصد: ١١٥/٢، الفصل الثالث، فى الفرق بين ما يباع من الطعام مكيلاً وجزافاً)

Maulānā Iʿjāz Ahmad Samdānī Sāhib explained *bayʿatān fī bayʿatin* and *safqatān fī safqatin* as two separate issues and stated that there is a general and specific relationship between the two. Refer to *Gharar Kī Sūratei*, pp. 65-129, for details.

Hakīmul Ummat Hadrat Thānwī rahimahullāh writes:

قال في نور الأنوار: وتعامل الناس ملحق بالإجماع وفيه ثم إجماع من بعدهم أى بعد الصحابة رضي الله عنهم من أهل كل عصر.

We learn from this that like ijmāʿ, taʿāmul (common practice of people) is not confined to any specific era. However, it is necessary to apply the same principles in taʿāmul as applied in ijmāʿ. In other words, the ʿulamāʾ of the present era do not express their disapproval of it. Similarly, the jurists have furnished taʿāmul as a basis for permitting many new issues.

كما فى الهداية: فى البيع الفاسد: ومن اشترى نعلاً على أن يحذوه البائع قوله يجوز للتعامل فيه فصار كصبغ الثوب للتعامل جوزنا الاستصناع وفيها فى السلم أن استصنع الى قوله للإجماع الثابت بالتعامل.[1]

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[1] *Fiqh Hanafī Ke Usūl Wa Dawābit*, p. 161 as quoted from *Imdād al-Fatāwā*, vol. 4, p. 265.

قال فی الکفایة: وجہ الاستحسان أن فیہ عرفاً ظاہراً وفی النزوع عن العادة حرج بین فصار کصبغ الثوب لأن القیاس أن لا یجوز لأن الإجارة بیع المنافع والصبغ عین وجوزناہا للتعامل وکالاستصناع فإن بیع المعدوم لا یجوز وإنما جوزناہ للتعامل. (الکفایة شرح الہدایة علی ہامش فتح القدیر: ٨٥/٦، رشیدیة)

وقال فی العنایة: ووجہہ ما بیناہ أنہ شرط لا یقتضیہ العقد وفیہ منفعة لأحد المتعاقدین وفی الاستحسان یجوز للتعامل والتعامل قاضٍ علی القیاس لکونہ إجماعاً فعلیاً کصبغ الثوب. (العنایة فی شرح الہدایة علی ہامش فتح القدیر: ٨٥/٦، رشیدی)

وقال في فتح القدیر: قولہ وفی الاستحسان یجوز البیع ویلزم الشرط للتعامل کذلک ومثلہ في دیارنا شراء القبقاب علی ہذا الوجہ أی علی أن یسمر لہ سیراً ...ومثلہ إجارة الظئر مع لزوم استہلاک اللبن جاز للتعامل... قولہ وللتعامل جوزنا الاستصناع مع أنہ بیع المعدوم ومن أنواعہ شراء الصوف المنسوج علی أن یجعلہ البائع قلنسوة بشرط أن یبطن لہا البائع بطانة من عندہ... وفی المنتقی... قال لو اشتری علی أن یہب لہ دیناراً من الثمن جاز وہو حسن لأن حاصل ہذا حطیطة مشترطة ومآلہا إلی الشراء بالثمن الأنقص ولو باع رقبة الطریق علی أن لہ حق المرور أو السفل علی أن لہ قرار العلو جاز. (فتح القدیر: ٨٥/٦، رشیدیة. وکذا فی شرح المجلة: ٦٤/٢-٧٠ المادة ١٨٨-١٨٩)

If trees are sold after the appearance of fruit on them, then Imām Mu<u>h</u>ammad ra<u>h</u>imahullāh says that it is permissible to leave the fruit on the trees. The proof for it is based on societal norms, tradition and commendableness.

وکذا إذا تناہی عظمہا عند أبي حنیفة وأبي یوسف لما قلنا واستحسنہ محمد للعادة. (الہدایة: ٢٦/٣)

The verdict is issued on the opinion of Imām Muhammad rahimahullāh because of taʿāmul.

القول الراجح هو قول محمد قال العلامة ابن الهمام يجوز عند محمد استحساناً وهو قول الائمة الثلاثة واختاره الطحاوي لعموم البلوىٰ. وقال العلامة الحصكفي: وبه يفتىٰ، بحر عن الأسرار... وقال العلامة ابن نجيم وفى الأسرار: الفتوىٰ على قول محمد وبه أخذ الطحاوي... قال أستاذنا المفتي غلام قادر النعماني: والعرف في زماننا يقتضي ترجيح قول محمد. (القول الراجح: ٩/٢)

Since the condition of surety is suitable in a transaction, the author of *al-Hidāyah* says that it is permissible.

قال فى الهداية: ومن باع داراً وكفل رجل عنه بالدرک فهو تسليم لأن الكفالة لو كانت مشروطة فى البيع فتمامه بقبوله ثم بالدعوىٰ يسعى في نقض ما تم من جهته وإن لم تكن مشروطة فيه فالمراد بها أحكام البيع وترغيب المشتري فيه إذ لا يرغب فيه دون الكفالة. (الهداية: ١٢٤/٣)

وفي شرح العناية: قال: إن الكفالة إما أن تكون مشروطة فى البيع أو لا، فإن كان الأول (أى مشروطة) وهو شرط ملائم للعقد. (العناية فى شرح الهداية على هامش فتح القدير: ٢١٧/٧، باب الكفالة)

ولو قال: اعتق عبدک عني بألف درهم، فأعتق، فإنه يعتق عن الآمر ويلزمه المال عن الآمر استحساناً. (المحيط البرهانى: ٢٨١/٤، كتاب العتاق، فصل فى المتفرقات، رشيدية)

وفى البدائع: ولو قال لآخر: اعتق عبدک عني على ألف درهم فأعتق فالولاء للآمر لأن العتق يقع عنه استحساناً...أن الأمر بالفعل أمر بما لا وجود للفعل بدونه كالأمر بصعود السطح يكون أمراً بنصب السلم والأمر بالصلاة يكون أمراً بالطهارة ونحو ذلک ولا وجود للعتق عن الآمر بدون ثبوت الملک

فكان أمر المالک بإعتاق عبده عنہ بالبدل المذكور أمراً بتمليكہ منہ بذلک البدل ثم بإعتاقہ عنہ تصحيحاً لتصرفہ كأنہ صرح بذلک فقال: بعہ مني واعتقہ عني ففعل... لأن الملک فى البيع الصحيح لا يقف على القبض، بل يثبت بنفس العقد فصار المامور بائعاً عبده منہ بالبدل المذكور ثم معتقاً عنہ بأمره وتوكيلہ. (بدائع الصنائع، كتاب الولاء، ١٦٠/٤، سعيد)

وفى درر الحكام: كأنہ قال: بع عبدک عني بألف وكن وكيلي بالإعتاق. (درر الحكام شرح غرر الاحكام، اكثر مدة الحمل، ٤٣٣/٤)

To summarize the above, this transaction – surety for freeing a slave – includes a surety for the sale. This is *safqah fī safqah*. Despite this, the jurists say that it is permissible on the basis of commendableness.

The author of *al-Hidāyah* states:

وكذا لو سلطا المرتهن على بيعہ لأنہ توكيل بالبيع وہما يملكانہ. (الهداية: ٥٢٩/٤، كتاب الرہن)

In the above text, a mortgage contract contains surety for a sale, which the jurists classify as permissible.

A sale with a condition of free service is permissible. This comprises *ijārah mashrūtah fī al-bay'*. Hadrat Muftī Taqī 'Uthmānī Sāhib explains it as follows:

In a sale contract, a condition which was against the requisite of the contract was laid down. However, traders – in their normal transactions – consider the condition to be included in the contract. It will be permissible to attach such a condition. For example, many items are sold while the merchant says: "I will provide a free service for one year." The provision of the free service is obviously not included in the requisite of the contract, but because it is commonly done, it is permissible. Therefore, if a buyer says: "I will buy this item on condition you provide one-year free service for it," the transaction will not be invalid because of this condition.[1]

[1] *Taqrīr Tirmidhī*, vol. 1, p. 108.

Observe the following text of Hadrat Thānwī rahimahullāh on the issue of *safqah fī safqah*:

Question: When the obvious meaning of نهى عن صفقة في صفقة is considered, certain transactions appear to be impermissible, whereas they are quite common among all sections of the community. For example:

(1) A person repairs a watch by removing a broken part and replacing it with a new one. It entails a sale of the part plus the labour for replacing it. (2) Asking a person to make a bed without providing the rope for its base. It entails a sale of the rope plus the labour for attaching it to the base of the bed. (3) Buying water from a water-carrier. He went to a well, drew out the water and filled it into his water-skin. He is now the owner of the water. This entails a sale of the water plus his labour of carrying the water. (4) A person asks a jeweller to set a stone [e.g. diamond] to a ring. It entails a sale of the stone plus the labour for setting it. There are many other similar transactions.

Answer: This is a common practice which is done without any objections from anyone. It is a type of ijmā' (consensus). All these transactions are permissible. The text is therefore general in nature, but specific in certain situations. The jurists permitted this in the cases of dying a garment and tailoring a garment. The acts of dying and sewing are done by the dyer and tailor, and it also entails hiring him for his labour. This is quite obvious. Allāh ta'ālā knows best.[1]

Hadrat Muftī Taqī 'Uthmānī Sāhib writes:

According to the Hanafīs, when a condition is attached to a transaction in normal situations, the transaction is invalidated. However, there are three types of conditions which are permitted and they do not invalidate the transaction. (1) A condition which is in line with the requisite of the transaction. (2) A condition which is expedient to the transaction. For example, conditions for mortgage, surety, bill of exchange (*hawālah*). (3) A condition which has become common practice.

If the condition of *wafā* is included in the contract of *bay' bi al-wafā'*, then some Hanafī jurists say that it is permissible. The author of *an-Nihāyah* has issued a fatwā on this. 'Allāmah Shāmī quotes the meaning of this from 'Allāmah Zayla'ī by saying that the transaction will become correct and it will also be lawful for the buyer to derive

[1] *Imdād al-Fatāwā*, vol. 3, pp. 63-64.

benefit from it. However, because this condition is laid in the sale that if the seller ever asks for the return of the price, the buyer will have to resell it; it is not permissible for the buyer to sell the item to someone else. Zaylaʿī says that this is the fatwā which is to be issued. ʿAllāmah Shāmī quotes from *Nahr* that this is the view which is practised in their area as preferred by Zaylaʿī. He adds: "The verdict of permissibility is probably based on the reasoning that this condition has become a common practice. Nonetheless, the majority of Hanafī jurists do not consider this form of agreement to be permissible – that the condition of *wafā* be included in the contract.

Muftī Taqī Sāhib then explains the proofs from *Shāmī, Muhīt Burhānī, Fatāwā Qādī Khān, Jāmiʿ al-Fusūlayn, Sharh al-Majallah*, etc.[1]

The second scenario where *safqah fī safqah* is permissible:

If the two contracts are separated, the transaction will become valid.

(In other words, if one contract is not like a prerequisite for the second one, the transaction will be valid).

The author of *al-Hidāyah* gives a few examples:

1. A person says: "I am selling five books for R200." The buyer says: "I have bought three books for R120," then this is not correct because the seller will now have to make two transactions with respect to a single sale item. However, if the seller says: "I am selling five books for R200, and I am selling each book for R40," and the buyer buys three books, then this will be permissible. This is because repetition of the word [selling] is found in this statement.

وليس له أن يقبل في بعض المبيع ولا أن يقبل المشترىٰ ببعض الثمن لعدم رضاء الآخر بتفرق الصفقة إلا إذا بين كل واحد لأنه صفقات معنى. (الهداية: ١٩/٣)

وفى الكفاية: قوله وليس له أن يقبل في بعض المبيع، وإذا أوجب البائع البيع في شيئين أو ثلاثة وأراد المشتري أن يقبل العقد في أحدهما دون الآخر فهذا على وجهين إن كانت الصفقة واحدة فليس له ذلک وإن كانت متفرقة فله ذلک وهذا لأن الصفقة إذا كانت واحدة فالمشتري بقبول العقد في أحدهما يريد

[1] *Ghayr Sūdī Bankārī*, pp. 242-247.

تفريق الصفقة على البايع وفي ذلك ضرر بالبائع لأن العادة فيما بين الناس أنهم يضمون الردئ إلى الجيد فى البياعات و ينقصون شيئاً عن ثمن الجيد لترويج الردئ بالجيد فلو ثبت خيار قبول العقد في أحدہما فالمشتري يقبل العقد فى الجيد ويترک الردئ على البايع فيزول الجيد عن ملک البايع بأقل من ثمنه وفيه ضرر بالبايع وقال القدوری: إلا أن يرضى البايع فى المجلس نحو أن يقول بعتک ہذا العبد بخمسين فيقول المشتري قبلت في نصفه فيرضى به البايع... ويكون ذلک من المشتري فى الحقيقة استيئناف إيجاب لا قبولاً فإذا رضي به البائع فى المجلس يصح. (الكفاية: ٤٦٢/٥، رشيدية)

While discussing this issue, ʿAllāmah Ibn Humām ra<u>h</u>imahullāh writes in *Fat<u>h</u> al-Qadīr* that if the price is distributed as parts, it will be permissible because each of the parts will be known. If the distribution is done on the basis of the value – e.g. the transaction is attributed to two slaves or two garments – it will be impermissible on the basis of ignorance. If the seller said: "I have sold you these two slaves; this one for one hundred and this one for one hundred," and the buyer accepts one of the two, then this is permissible in certain situations. *Al-Jāmiʿ a<u>s</u>-<u>S</u>aghīr* states that it is necessary to repeat the word *bayʿ* for the transaction to be permissible. For example, "I have sold you these two slaves; I have sold you this one for one hundred and I have sold you this one for one hundred."

...إلا أن يرضى الآخر بذلک بعد قبوله فى البعض ويكون المبيع مما ينقسم الثمن عليه بالأجزاء كعبد واحد أو مكيل أو موزون، فإن كان مما لا ينقسم إلا بالقيمة كثوبين وعبدين لا يجوز وإن قبل الآخر... فلو كان بين ثمن كل منهما فلا يخلو إما أن يكون بلا تكرار لفظ البيع أو بتكراره، ففيما إذا كرره فلاتفاق على أنه صفقتان فإذا قبل في أحدہما يصح مثل أن يقول بعتک ہذين العبدين بعتک ہذا بألف وبعتک ہذا بألف أو اشتريت منک ہذين العبدين اشتريت ہذا بألف واشتريت ہذا بألف كذا في موضع...(فتح القدير: ٢٥٥/٦، ٢٥٧، دار الفكر)

2. A person gives one dirham to a money-changer and says to him: “Give me cash money in exchange for half a dirham, and half dirham except *habbah* for the other half dirham. Imām Abū Yūsuf and Imām Muhammad rahimahumallāh are of the view that the transaction is permissible with respect to the first half dirham, and impermissible with respect to the second half because it is interest. Imām Abū Hanīfah rahimahullāh says that it is invalid with respect to everything because the transaction is one. When part of it is invalid, the remainder becomes invalid because of the strength of the invalidity. If the person repeats the word *i'tā'* (give) and says: “Give me cash money in exchange for half a dirham, and for the other half dirham, give me half dirham except *habbah*,” then all the Imāms concur that the transaction with respect to the half which was exchanged for cash money will be correct because the word “give” was repeated. The word *habbah* equals 620 milligrams.

قال فى الهداية: ومن أعطى صيرفياً درہماً وقال أعطنى بنصفه فلوساً وبنصفه نصفاً إلا حبة جاز البيع فى الفلوس وبطل فيما بقي عندہما وعلى قياس قول أبي حنيفة بطل فى الكل ولو كرر لفظ الإعطاء بأن قال: أعطنى بنصفه كذا فلساً وأعطني بنصفه الباقي نصفاً إلا حبة فالحكم أن العقد في حصة الفلوس جائز بالإجماع ہو الصحيح. (الہداية مع الحاشية: ٣/١١٠، ١١١)

Answers to the Hadīth

There are three answers to the Hadīth under discussion.

1. The prohibition was based on societal norms. When the latter changed, the ruling changed.
2. It is a general ruling, but specific to certain situations.
3. Two transactions are done here.

The first two answers need to be explained.

There are three types of texts.

(1) Ahādīth which are based on societal norms. The ruling in this regard is that when societal norms change, the ruling of the text changes. For example, wheat and barley were commonly known as items which are sold by volume. This norm continued for some time. The norm has now changed and they are sold by weight. This is why they are referred to as *waznī* [and not *kaylī*].

This is further clarified by ʿAllāmah Shāmī rahimahullāh and Shaykh Mustafā az-Zarqā:

وعن الثاني اعتبار العرف مطلقاً ورجحه الكمال وخرج عليه سعدي أفندي استقراض الدراهم عدداً وبيع الدقيق وزناً في زماننا يعني بمثله وفى الكافى الفتوىٰ على عادة الناس بحر، وأقره المصنف. (قوله مطلقاً) أى وإن كان خلاف النص، لأن النص على ذلك الكيل فى الشيء أو الوزن فيه ما كان في ذلك الوقت إلا لأن العادة إذ ذاك كذلك وقد تبدلت فتبدل الحكم... (قوله ورجحه الكمال)حيث قال عقب ما ذكرنا: ولا يخفى أن هذا لا يلزم أبا يوسف لأن قصاراه أنه كنصه على ذلك وهو يقول: يصار إلى العرف الطارئ بعد النص بناء أن تغير العادة يستلزم تغير النص، حتى لو كان صلى الله عليه وسلم حياً نص عليه وتمامه فيه،... وملخصه: أن النص معلول بالعرف فيكون المعتبر هو العرف في أى زمن كان ولا يخفى أن هذا فيه تقوية لقول أبي يوسف فافهم. (الدر المختار مع رد المحتار: ١٧٦/٥، مطلب فى ان النص اقوى من العرف، سعيد. وفتح القدير: ١٥/٧، دار الفكر)

وقال مصطفى أحمد الزرقا: خلافاً لأبي يوسف الذي يعتبر المقياس المتعارف فيهما مطلقاً في كل زمن بحسبه، ويتبدل مقياس التساوي بتغير العرف تبعاً له حيث يعلل النص بالعرف الذي كان قائماً وقت وروده، فلا يكون اتباع العرف عند أبي يوسف مخالفاً للنص، بل يراه هو الموافق للنص، وأن الثبات على المقياس القديم الذي ورد فى النص هو المخالف للنص، فهو يعتبر هذا النص نصاً عرفياً، بمعنى أنه ذكر فيه المقياس الذي عينه النص، لأنه كان هو المتعارف حين وروده النص، ولو كان المتعارف مقياساً آخر لورد النص بذلك الآخر، لأن مقاييس الكميات تتبع الأعراف، ولتنظر رسالة "نشر العرف فيما بنى من الأحكام على العرف" لابن عابدين. وقد أوضحت هذه المسألة في كتابى

المدخل الفقهى العام. (حاشية شرح القواعدالفقهية، ص ٢٢١، تحت القاعدة: العادة محكمة)

Take another example. Rasūlullāh sallallāhu ʿalayhi wa sallam said with reference to a lost camel – that one should not interfere with it. Let it be because it has its water-skins and shoes with it. In other words, do not make it a *luqtah*. Imām Abū Hanīfah rahimahullāh says that this Hadīth is based on the societal norms of that era, and they have changed in later times. People in the past would not leave their camels open. This is why if a person came across a stray camel, he could catch it with a view to protect it, and its owner may then come and reclaim it. These details are known to students who have studied Kitāb al-Luqtah in the Hadīth books.

A third example: If a person needed milk and reached a flock of sheep or goats which were herded by a shepherd, and the latter was not present, the person would call out for the shepherd three times. If the shepherd did not reply, the person could milk an animal and drink the milk. Or a person went to an orchard and did not find the owner there. He may call out for him three times. If he does not answer his call, he may break some fruit and eat it. Yes, he may not fill any fruit in a container to take away with him.

In addition to several other answers to this Hadīth, the commentators say that it reflects the norms and habits of that era. In those days, an arriving guest could take these items according to need. ʿAllāmah ʿAynī rahimahullāh says in this regard:

والثالث: أن ذلک محمول على ما إذا علم طيب نفوس أرباب الأموال بالعادة أو بغيرها. (عمدة القارى: ١٧٤/٩، دار الحديث ملتان).

Muftī Taqī Sāhib also writes in a similar vein:

أن ہذه المسائل تدور على العرف والعادة وكانت عادة أہل الحجاز والشام المسامحة في مثل ہذا، بخلاف البلاد الأخرى. (تكملة فتح الملهم: ٦٢٧/٢)

The norms changed later on, and now a guest may not take these items without permission.

قال العلامة العينى: وقال جمهور العلماء وفقهاء الأمصار، ومنهم الأئمة أبو حنيفة ومالك والشافعي وأصحابهم: لا يجوز لأحد أن يأكل من بستان أحد

ولا يشرب من لبن غنمه إلا بإذن صاحبه. (عمدة القارى: ۱۷٤/۹، دار الحديث ملتان)

(2) The second type are those texts and Ahādīth which prohibit a thing because of its inherent repugnance. It will remain unlawful under all situations. For example, usury, gambling, and transactions which contain the elements of cheating, deceiving and deluding.

(3) Ahādīth which prohibit a thing because it could lead to dispute and quarrel. If it does not lead to dispute, its prohibition will not remain. Instead, there will be leeway for it. One example of this can be found in *Sahīh Bukhārī*, vol. 1, p. 292. People used to sell fruit before their flowers could mature on the trees. The fruit would then fall prey to various types of illnesses, and the buyer would dilly dally in the payment; while the seller would demand the full price. When disputes of this nature were presented to Rasūlullāh sallallāhu 'alayhi wa sallam, he said: "I advise you not to sell the fruit before maturity." We learn that the prohibition of sale of fruits on the custom of retaining them on the trees was due to the disputes it caused. And that Rasūlullāh sallallāhu 'alayhi wa sallam said this as a word of advice; it was not an absolute prohibition. A narration of *Sahīh Bukhārī* reads:

واشترى نافع بن الحارث داراً للسجن بمكة من صفوان بن أمية على إن عمر رضي الله عنه رضي بالبيع فالبيع بيعه وإن لم يرض عمر رضي الله عنه فلصفوان أربع مائة دينار. (رواه البخارى: ۳۲۷/۱)

Nāfi' ibn al-Hārith bought a building in Makkah to make it into a prison. He bought it from Safwān ibn Umayyah on the condition that Hadrat 'Umar radiyallāhu 'anhu agrees to it, then the transaction will be for him. If he does not agree to it, then it is for himself, and he will pay Safwān four hundred dīnārs.

This transaction has a precondition. It is classified as *safqah fī safqah*. The commentators provide several answers for it, but Hadrat Shāh Sāhib rahimahullāh writes in *Fayd al-Bārī*:

وقد علمت أن الفساد إذا كان لأجل مخافة النزاع لا يسرى إلى العقد إذا لم يرفع أمره إلى القضاء أما إذا كان لكونه معصية فيلزم حينئذٍ والمذكور فى الحديث من النحو الأول. (فيض البارى: ۲۲۳/۳)

Maulānā Badr ʿĀlam Sāhib rahimahullāh writes in his annotation to the above:

وفى جامع الفصولين: من اشترى حزمة من الحطب له أن يشترط حمله إلى البيت وفى الهداية: أن ما تعارف الناس عليه من الشرائط تتحمل فى البيوع. قلت: لأنه لا تفضي إلى النزاع. (٣/٢٢٣)

Imām Tirmidhī rahimahullāh gives three explanations to *safqah fī safqah*. I am leaving out the third explanation because it is explicitly invalid and harām due to it comprising expressly of interest.

First explanation: Zayd says: "This item is one hundred dirhams if paid in cash, and two hundred dirhams if bought on credit and paid over two months." ʿUmar replies: "I have accepted," but did not specify which of the two he has accepted. This transaction could lead to a dispute. For example, the buyer may say: "I will pay two hundred after two months," while the seller says: "I want one hundred dirhams now."

The second explanation is related from Imām Shāfiʿī rahimahullāh and quoted by Shāh Sāhib rahimahullāh in *al-ʿArf ash-Shadhī*:

نقل صاحب المشكاة عن الخطابى تفسير بيعتين في بيع مثل ما ذكر الترمذى عن الشافعى وهو المختار وهو تفسير أبي حنيفة فى كتاب الآثار انتهى، ذكره فى باب النهى عن بيعتين. (العرف الشذى على هامش الترمذى: ١/٢٣٤)

The gist of this explanation is: Zayd says: "O ʿUmar! I am selling you such and such house for R100 000 provided you sell me your special horse for R50 000." ʿUmar accepted the offer. Incidentally, ʿUmar's horse died, so Zayd says: "I am not going to give you my house or, I will give it to you for R120 000 because I did not get the horse which I wanted." This is obviously a dispute. However, in situations where disputes do not normally occur or do not occur in the above mentioned situations, then it will be permissible.

The books of jurisprudence and principles of jurisprudence contain:

أعتق عبدك عني بألف درهم.

This means that a person is asked to buy a slave for one thousand dirhams, and is then appointed as his representative to free the slave. However, the absence of a dispute makes this transaction permissible.

Similarly, in reply to a questioner, Hadrat Thānwī rahimahullāh labelled certain transactions to be permissible because in their [questioner's] society, they do not result in disputes. The questioner asked:

(1) A person repairs a watch by removing a broken part and replacing it with a new one. It entails a sale of the part plus the labour for replacing it. (2) Asking a person to make a bed without providing the rope for its base. It entails a sale of the rope plus the labour for attaching it to the base of the bed. (3) Buying water from a water-carrier. He went to a well, drew out the water and filled it into his water-skin. He is now the owner of the water. This entails a sale of the water plus his labour of carrying the water. (4) A person asks a jeweller to set a stone [e.g. diamond] to a ring. It entails a sale of the stone plus the labour for setting it. There are many other similar transactions.

Hadrat Thānwī rahimahullāh said that the above are permissible on the basis that transactions of this nature are commonly practised.[1]

Someone could raise this objection: The rule is that *safqah fī safqah* is prohibited. Excluding some individuals from it because of societal norms is similar to excluding the usury of banks from the prohibition of usury because of people practising it. How can this be permissible? We can leave out qiyās on the basis of *ta'āmul* (common practice). For example, all individuals of qafīz at-tahhān (dry measure of a miller) are impermissible. However, based on qiyās, the payment which is given to the commission agent is not impermissible. Rather, it is classified as permissible on the basis of common practice. In such a case, it will be correct.

The answer to this is that the prohibition in the Hadīth of *safqah fī safqah* is based on the dispute which it could cause. Where there are no disputes due to common practice and societal norms, then those will be excluded from this prohibition. Nowadays, there are many transactions where the condition of *bay' fī bay'* or a precondition is well-known. For example: (1) Providing a free one-year service when selling a machine, (2) Women give their garments to a dyer, a price is agreed upon, and the transaction contains the actual sale of the dye plus the labour for dying it. (3) Machines or vehicles are given to a mechanic. He replaces broken parts and charges for his labour. A vehicle meets in an accident. It is then taken to a mechanic who says that such and such parts will need to be replaced, and the car will have to be repaired. Is this not a combination of a sale plus labour? It

[1] *Imdād al-Fatāwā*, vol. 3, pp. 64-65.

certainly is. However, it is commonly practised. In fact, it has become a part of our daily life. We conclude that when a precondition becomes well-known, or it is not a cause of dispute due to *safqah fī safqah*, then it is tolerable. ʻAllāmah Shāmī rahimahullāh writes:

ثم اعلم أن العرف قسمان عام وخاص فالعام يثبت به الحكم العام ويصلح مخصصاً للقياس والأثر بخلاف الخاص... قال فى الذخيرة فى الفصل الثامن من الإجارات في مسألة ما لو دفع إلى حائك غزلاً لينسجه بالثلث ومشايخ بلخ كنصير بن يحي ومحمد بن سلمة وغيرهما كانوا يجيزون هذه الإجارة فى الثياب لتعامل أهل بلدهم فى الثياب والتعامل حجة يترك به القياس ويخص به الأثر وتجويز هذه الإجارة فى الثياب للتعامل بمعنى تخصيص النص الذي ورد في قفيز الطحان لأن النص ورد في قفيز الطحان لا فى الحائك إلا أن الحائك نظيره فيكون وارداً فيه دلالة فمتى تركنا العمل بدلالة هذا النص فى الحائك وعملنا بالنص في قفيز الطحان كان تخصيصاً لا تركاً أصلاً وتخصيص النص بالتعامل جائز ألا ترى أنا جوزنا الاستصناع للتعامل والاستصناع بيع ما ليس عنده وإنه منهي عنه وتجويز الاستصناع بالتعامل تخصيص منا للنص الذي ورد فى النهي عن بيع ما ليس عند الإنسان لا ترك للنص أصلاً لأنا عملنا بالنص في غير الاستصناع. (شرح عقود رسم المفتى، ص ٤١. وكذا فى رسالة "نشر العرف فى بناء بعض الاحكام على العرف" المندرجة فى رسائل ابن عابدين، ١١٤/٢، سهيل)

ʻAllāmah Nasafī rahimahullāh states:

...والاستصناع فيما فيه تعامل الناس مثل أن يأمر إنساناً بأن يخرز له خفاً بكذا ويبين صفته ومقداره ولم يذكر له أجلاً والقياس يقتضي أن لا يجوز لأنه بيع معدوم لكنهم استحسنوا تركه بالإجماع لتعامل الناس فيه. (منار مع شرحه لعبد اللطيف ابن الملك، ٨١٢/٢)

The following is one of several examples of *safqah fī safqah*:

The jurists says that a cash payment is not necessary in a labour transaction (where a person is asked to make an item). It can be paid later on. The objection to this is that it will then become *bayʿ ad-dayn bi ad-dayn* because the manufactured item is a responsibility and the price has been deferred. The answer that is given is that it contains a combined similarity with a hiring contract (ijārah) and a sale. Because it is similar to a sale, the price can be paid later on. And because it is similar to a hiring contract, it is as though the craftsman is doing the work for a wage, and he will be paid for it later on. For example, a builder is asked to build a wall and he receives his payment after he completes the job. This entails a combination of a sale and a hiring (*bayʿ wa ijārah*).

و ينعقد الاستصناع إجارة ابتداء وبيعاً انتهاء. (الكفاية على الهداية: ٢٤٣/٦، باب السلم، مكتبه رشيديه)

Allāh taʿālā knows best.

Purchasing a house through a bank

Question

A person purchases a house through a bank. There are two ways he could do this. (1) He takes an interest-loan from the bank and buys the house. (2) The bank buys the house for R500 000 and sells it to the needy person for R600 000 on credit. Which of the two should he opt for?

Answer

He should opt for the second because, in normal situations, it is not permissible to take an interest-loan from a bank. The second option is one of murābaḥah, and it is permissible to do this provided it is stated in the agreement that such and such additional amount will be collected in each instalment.

Īḍāḥ al-Masā'il:

The best and easiest method of buying a vehicle and other items through a bank is for the bank to send one of its representatives with the buyer. As an example, the representative and the buyer agree to buy a vehicle for 100 000 from a company. The vehicle costing 100 000 now belongs to the bank. The same representative of the bank then – as per the rules of the bank – hands over the vehicle to the buyer for 110 000. After that, the bank will collect the amount of 110 000 from

the person in instalments. This is permissible according to the Sharīʿah. (*Fatāwā ʿĀlamgīrī*, vol. 2, p. 160)

Another way of doing this is for the bank not to send its representative. Rather, it appoints the buyer as its representative. The buyer buys the vehicle for 100 000 and hands it over to the bank. The bank then sells it immediately to the buyer for 110 000. He will then pay this amount in instalments as per the rules laid down by the bank within a certain period. This transaction is permissible according to the Sharīʿah. As gauged from *Imdād al-Fatāwā*, vol. 3, p. 125.[1]

فتاوى الشامى:

عللہ الحانوتي بالتباعد عن شبہة الربا لأنها في باب الربا ملحقة بالحقيقة، ووجہہ أن الربح في مقابلة الأجل، لأن الأجل وإن لم يكن مالاً، ولا يقابلہ شيء من الثمن، لكن اعتبروه مالاً فى المرابحة إذا ذكر الأجل بمقابلة زيادة الثمن، فلو أخذ كل الثمن قبل الحلول كان أخذه بلا عوض. (فتاوى الشامى: ٧٥٧/٦، قبيل كتاب الفرائض، سعيد. وكذا ١٤٢/٥، باب المرابحة، سعيد)

البحر الرائق:

وجوابہ أن الأجل في نفسہ ليس بمال فلا يقابلہ شيء حقيقة إذا لم يشترط زيادة الثمن بمقابلتہ قصداً ويزاد فى الثمن لأجلہ إذا ذكر الأجل بمقابلة زيادة الثمن قصداً فاعتبر مالاً فى المرابحة احترازاً عن شبہة الخيانة. (البحر الرائق: ١١٥/٦، باب المرابحة، كوئٹہ)

Further reading: *Ghayr Sūdī Bankārī*, p. 78; *Kifāyatul Muftī*, vol. 8, p. 54; *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5, p. 90; vol. 3, p. 118.

Allāh taʿālā knows best.

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[1] *Īdāh al-Masā'il*, p. 158.

ISLAMIC BANKING

Definition of a bank

A bank is a financial institution which receives amounts of money from people, and then gives the money as loans to traders, craftsmen and other individuals. Traditional banks collect interest on these loans, and give their depositors an interest amount which is of a lower percentage. The difference between these two interests is the profit of the bank.

A bank invites people to deposit their monies (which in fiqhī terms is a loan). In Urdu its call *amānatei*, in Arabic it is called *wadā'iʿ* and in English it is called deposits. There are several types of deposits:

1. Current account. In Arabic it is called *al-ḫisāb al-jārī* and *moedd rawā* in Urdu. A person does not receive interest for monies deposited in this account. A depositor can withdraw any amount at any time without any restrictions.

2. Savings account. In Arabic it is called *ḫisāb at-tawqīr* and *bachat khātah* in Urdu. Generally, there are various restrictions on withdrawing from this account. The account holder receives interest on it.

3. Fixed deposit. In Arabic is it called *wadā'iʿ thābitah*. The person who makes a deposit into this account cannot withdraw it before the specified date. The bank gives him interest for this deposit. The percentage of interest depends on the length of the fixed deposit. The longer the period, the more the interest, and the shorter the period, the less the interest.

After collecting the monies, the bank plays several roles. For example, investments, gold offerings, acting as an agent for import and export, etc. Details in this regard can be found in *Islām Aur Jadīd Maʿīshat Wa Tijārat* and other books.

Islamic banking

The activities of the bank can be fundamentally divided into two parts:

1. Responsibility

An interest-bank collects monies from its depositors and offers various types of accounts for this purpose. Essentially, there are two types of accounts:

a) Non-profit account. Also known as a current account.

b) Profit-bearing account. This includes a saving account, fixed deposit, etc.

Non-profit/current account

The amount which an Islamic bank receives as a current account is classified as a non-interest loan in the Sharīʿah. The account holder is given a guarantee that his money will be returned to him. And every guaranteed amount is known as a loan. The person does not receive any additional amount. Only the original amount is returned to him. It is therefore synonymous to a non-interest loan.

Profit-bearing account

Apart from a current account, the money which an Islamic bank receives for other accounts such as a saving account or fixed deposit, it receives it on the basis of muḏārabah or mushārakah. The depositor takes on the role of a *rabb al-māl* (the one who provides the capital) or a silent partner; while the Islamic bank takes on the role of a *muḏārib* (speculator) or active partner.

The Islamic bank makes profits through its investment schemes such as murābaẖah, ijārah, mushārakah. From these profits, it pays its depositors their shares as agreed upon from before hand. For example, it states that whatever profits the bank makes, fifty percent will be for the bank and fifty percent for the depositor. The amount which the depositor deposits into the bank is classified as an amānat or trust by the Sharīʿah. This means that if the money is destroyed without an excess, shortcoming or negligence committed by the bank, then the bank will not be held responsible.

It should be borne in mind that when an Islamic bank accepts a capital amount from its depositor, it cannot guarantee its return under every situation. Nor can it definitively say at the beginning the amount of profit which the depositor will receive. In fact, it is not even permissible for it to say with definitiveness the percentage with the depositor will receive on the basis of the amount which he deposited. If it does, the partnership will be invalidated. Generally, an Islamic bank does not even know how much profit it will make from a particular capital amount.

Yes, if at the end of a term, it gives a depositor a share in line with the amount which he deposited, it can ascertain the difference between the capital amount and the profit, and then inform him of the percentage share. This is not impermissible in the Sharīʿah.

We learn from this that if, after the distribution of profits, an Islamic bank announces that it gave ten percent profit to its depositors this

year, then this will not be in conflict with Sharīʿah principles. However, if, at the beginning, it says that it will give a certain percentage for the capital deposit, then this is not permissible in the Sharīʿah.

2. Ownership options

Here, the bank provides various ownership options to its investors. In other words, the bank provides ownership options to those who contact the bank for their financial needs.

Bearing in mind the various needs of its clients (those who take loans from the bank), several transactions are available to them. Nowadays, three types of transactions are quite common:

1. Murābahah.
2. Ijārah.
3. Mushārakah Mutanāqisah.

Sometimes, ownership options through *salam* and *istisnāʿ* are also offered.

1. Murābahah

Murābahah is actually a type of sale in which the person having the goods says to the buyer: "This is what these goods cost me. This is the amount of profit I am making, and then selling them to you."

The murābahah in banks comprises of the following steps:

1. General agreement: The bank and the client enter into a general agreement. The maximum amount [price] of goods which the client will buy from the bank is decided, the amount of profit which the bank will make on the purchased goods, and the method of repayment, etc. are discussed.

2. Purchase of goods: The bank then purchases those goods from the market which it has to sell to the client. Generally, the client is appointed as the representative for the purchase of the goods. But this is not always the case.

3. Possession of the purchased goods: If the client was made the representative for the purchase, then after buying the goods, he takes possession of them and informs the bank: "I have purchased the goods as your representative and taken possession of them." According to the Sharīʿah, the qabdah of the representative is actually the qabdah of the one who appointed him. This is why it will be accepted that this, as per the Sharīʿah, entails the qabdah of the bank. At this stage, all the

injunctions related to qabḏah will apply. Among them a specific ruling is that if the goods are destroyed without any transgression by the client, the loss will be borne by the bank, and not the client.

4. The formalisation of the murābahah agreement:

The client then makes an application to the bank to sell him the goods at an agreed price which would include the costs and the bank's profit, and he will pay the total amount immediately or over a specified period. When the bank accepts this, the murābaẖah comes into existence and the payment of the amount becomes obligatory on him. The bank takes some guarantees from the client for the amount which he has to pay.

2. Ijārah

In the definition of the Sharīʿah, ijārah refers to deriving a specific and lawful benefit from an item or person in return for a payment.

Difference between ijārah of an interest- and Islamic bank:

An ijārah agreement is prevalent in interest- and Islamic banks. The differences between the two banking systems are therefore explained here.

The ijārah system in conventional banks contains the following three drawbacks:

a) A single contract contains a sale and an ijārah. The instalments which the client pays during the ijārah period are initially included in the ijārah instalments. But as the rental period comes to an end, the instalments are considered to be the value, and the item automatically comes into the ownership of the client. This is known as *safqah fī safqah* which is not permissible in the Sharīʿah.

b) All responsibilities related to the item given as an ijārah are borne by the tenant. Whereas, in the Sharīʿah, only the responsibilities related to the use of the item are placed on the tenant. For example, servicing the vehicle, changing the oil, etc. As for the responsibilities which are related to the owner of the item, they are placed on the shoulders of the rentee. For example, paying taxes, repairing it if it is damaged by a sudden calamity, etc.

c) The rent for the item which is given on rent has to be paid by the client before he can even receive it. Whereas in the Sharīʿah, it is not permissible to charge rent to the tenant for as long as the item is not given over to him.

On the other hand, the above-listed drawbacks are done away with by Islamic banks in the following way:

a) In the beginning, the agreement is solely an ijārah. The item given as ijārah remains the property of the bank. Once the ijārah period comes to an end, the client is given the choice to buy it at a specified price or return it to the bank. In the first case, the bank sells the item to the client through an independent and separate transaction. Sometimes, the bank gives the item to the client, also through an independent and separate transaction. In this way, the prohibition of *s̲afqah fī s̲afqah* does not apply.

b) The ijārah transactions of Islamic banks explicitly state that the tenant/renter will only bear those expenses which are related to the use of the vehicle. This is known as *s̲iyānah ʿādiyah* (general or normal upkeep). All other responsibilities will be borne by the bank on the basis that it is the owner of the vehicle. Taxes, insurance, takāful, damage to the vehicle in the case of an accident – all these will be taken care of by the bank.

c) The Islamic bank does not collect any rent from the client as long as the rental contract is not completed by the Islamic bank, and the item not handed over to the client.

3. Mushārakah Mutanāqis̲ah[1]

The third major form of ownership which is offered by Islamic banks is known as mushārakah mutanāqis̲ah. Through this transaction, ownership of houses is generally realized. This is why it is also known as "home partnership". This system comprises of three fundamental steps:

a) The Islamic bank and its client purchase a house collectively. The share of the bank is generally more than that of the client. For example, a house was bought as a partnership with the bank having 80% of the share and the client having 20%.

b) The share of the bank is divided into small parts. In the above example, the bank's share is divided into eighty units. The client then buys one unit at a time from the bank. In this way, the client's share increases while that of the bank decreases.

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[1] Diminishing partnership – a partnership contract between two parties where one party's instalments will gradually increase his share in the property until the whole ownership.

c) The units which are owned by the bank are leased by the client under a rental contract, and he is able to use the house. Because he is using it, he continues paying the rent for it. Since the client is purchasing the units independently, the rental amount also decreases gradually. Once the client buys all the units belonging to the bank, he becomes the owner of the entire house.

In the above process, three fundamentals steps were taken:

1. A house was bought in a partnership.
2. One partner took the portions belonging to the other partner on rent.
3. One partner (the client) bought the portions belonging to the other partner (the bank).

For this agreement to be valid, it is essential that no agreement is preconditioned with a third person. In the above process, no precondition is made with anyone else. Rather, the client makes a one-sided promise that if the bank buys the house, he will take the bank's portion on rent and pay the required rent for it. Furthermore, he will buy the various units of the bank's portion over a period of time.

Further reading: *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5; *Islāmī Bankārī Aur Muttafaqah Fatwei Kā Tajziyah*; *Islām Aur Jadīd Maʿīshat Wa Tijārat*.

Allāh taʿālā knows best.

FORWARD BUYING AND MANUFACTURING

Bay' salam when trading in mangoes

Question

A man's son is to get married after two months. Distinguished guests from all over the country are expected to attend. Mangoes of that region are quite popular, so he enters into a bay' salam agreement with one of the farmers. He says: "I want one thousand kilos of such and such variety of mangoes on such and such date, at such and such price." However, no mangoes were available in the market as yet. Is this bay' salam permissible?

Answer

In this situation, instead of a bay' salam, he should make a promise with the farmer of buying the mangoes at a specific price. But if there is a need to enter into a bay' salam, it will not be possible according to Imām Abū Hanīfah rahimahullāh because if they were to do this, the item has to be available in the market from the time the agreement is made to the time the goods [mangoes] are handed over. In this case, the mangoes are not available anywhere in the market. Yes, if there is an imposing need, there is room to act on the view of Imām Shāfi'ī rahimahullāh. Hadrat Thānwī rahimahullāh and Hadrat Muftī Walī Hasan Sāhib rahimahullāh issued verdicts on this issue based on the view of Imām Shāfi'ī rahimahullāh.

Imdād al-Fatāwā:

The Hanafī scholars say that in a bay' salam, it is a prerequisite for the item to be available from the time of the agreement to the appointed time. If this prerequisite is not met, the bay' salam will not be permissible. However, Imām Shāfi'ī rahimahullāh is of the view that it will suffice if the item is at least available at the appointed time. (*al-Hidāyah*, vol. 3, p. 93) Thus, if this view is practised upon at the time of necessity, there will be no reproach; it is a concession.[1]

Since there is a common suffering (ibtilā' 'ām), there is room to practise on the view of Imām Shāfi'ī rahimahullāh.[2]

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[1] *Imdād al-Fatāwā*, vol. 3, p. 106.

[2] Ibid. p. 21.

Dars al-Hidāyah:

Bearing in mind present-day challenges, the jurists say that – in matters related to these issues - if the fatwā is issued on the view of Imām Shāfiʿī raḫimahullāh, then there is room for it so that the wealth of people may be protected against impermissibility.

Note: There is a system of worship and a system of transaction in this world. Acts of worship need to be supported by texts. As for transactions, every Imām can look for ease.[1]

Further reading: *Mālī Muʿāmalāt Parr Gharar Ke Atharāt*, pp. 39-43.

Allāh taʿālā knows best.

Length of time in bay' salam

Question

Can a bayʿ salam be specified for less than one month?

Answer

Most jurists say that a bayʿ salam must be at least one month. Any period less than this is not correct. However, Imām Karkhī raḫimahullāh said that within whatever period the salam item can be obtained will suffice as a specified period, even if it is less than one month. The view of Imām Karkhī raḫimahullāh can be chosen at the time of need and on the basis of general suffering.

الهداية:

ولا يجوز السلم إلا مؤجلا... ولا يجوز إلا بأجل معلوم لما روينا ولأن الجهالة فيه مفضية إلى المنازعة كما فى البيع، والأجل أدناه شهر وقيل ثلاثة أيام وقيل أكثر من نصف اليوم والأول أصح. (الهداية: ٩٤/٣)

البناية:

وفى الذخيرة: عن الكرخي أنه ينظر إلى مقدار المسلم فيه و إلى عرف الناس فى التاجيل فيه فإن كان قدراً أجل أحد يؤجل مثله فى العرف والعادة يجوز

[1] *Dars al-Hidāyah*, p. 329.

السلم، قوله والأول أصح، وقال الصدر الشهيد في طريقته المطولة والصحيح ما رواه الكرخى أنه مقدار ما يمكن فيه تحصيل المسلم فيه. (البناية فى شرح الهداية الجزء الثالث، ص ١٨٨)

البحر الرائق:

وفى البناية وقال الصدرالشهيد... فقد اختلف التصحيح ...وفي فتح القدير بعد نقل تصحيح الشهيد وهو جدير أن لا يصح ... أقول: هو جدير بأن يصحح ويعول عليه فقط. (البحر الرائق: ١٦٠/٦، باب السلم، كوئته)

المحيط البرهانى:

عن أبى الحسن الكرخى أنه ينظر إلى مقدار المسلم فيه وإلى عرف الناس في تأجيل مثله، فإن شرط أجلاً يؤجل لمثله فى العرف والعادة تجوز السلم وما لا فلا. (المحيط البرهانى: ١٨٠/٨، فصل فى السلم، مكتبة رشيدية)

Hadrat Thānwī rahimahullāh writes in *Imdād al-Fatāwā*:

A bay' salam has to be for a minimum period of one month. Because Imām Shāfi'ī rahimahullāh does not regard a period of time to be a prerequisite, this agreement can be included in the salam due to the presence of general suffering. Thus, there is room to act on the view of Imām Shāfi'ī rahimahullāh.[1]

Mālī Mu'āmalāt Parr Gharar Ke Atharāt:

However, certain contemporary 'ulamā' are of the view that it is better to adopt this view in present day transactions...therefore, if both parties happily agree to a certain period of time, there is no proof to classify it as impermissible.[2]

وللاستزادة انظر: فتح القدير: ٨٧/٧، دار الفكر. وتبيين الحقائق: ١١٥/٤، باب السلم، ملتان. ومجمع الانهر شرح ملتقى الابحر: ١٠٠/٢.٨)

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[1] *Imdād al-Fatāwā*, vol. 3, p. 21.

[2] *Mālī Mu'āmalāt Parr Gharar Ke Atharāt*, p. 47.

Allāh taʿālā knows best.

Bay’ salam when trading in meat

Question

My son is about to get married. Some days before the wedding, I went to a butcher and said to him: “I want thirty kilos of such and such quality of meat, on such and such date, at such and such time. We want to prepare biryānī with it.” Some ʿulamā’ objected and said that this entails bayʿ salam, which is impermissible. What is the ruling of the Sharīʿah?

Answer

If the meat has been described fully and it will not lead to any dispute, it will be permissible to do this.

ولا خير فى السلم فى اللحم عند أبي حنيفة وقالا: إذا وصف من اللحم موضعاً معلوماً بصفة معلومة جاز. (الهداية: باب السلم، ٩٤/٣)

We learn from the above text that Imām Abū Hanīfah rahimahullāh considers bayʿ salam in meat to be impermissible. However, Imām Abū Yūsuf and Imām Muhammad rahimahumallāh say that if the meat is described in such a way that it will not lead to a dispute, then it will be permissible. Many latter day jurists have issued their fatāwā on the view of these two Imāms.

البناية:

وقال: وفى الحقائق والعيون: الفتوىٰ على قولهما، لأن اللحم موزون في عادة الناس مضبوط الوصف ببيان هذه الأشياء. (البناية فى شرح الهداية: ١٨٦/٣، ط: فيصل آباد)

فتح باب العناية:

ولا يصح السلم فى اللحم عند أبي حنيفة ويصح عندهما وبه يفتىٰ. (فتح باب العناية: ٢٧٨/٣)

البحر الرائق:

وقالا: يجوز إذا بين جنسه ونوعه وسنه وموضعه وصفته وقدره كشاة خصي ثني سمين من الجنب أو الفخذ مائة رطل، لأنه موزون مضبوط الوصف... وفى الحقائق والعيون الفتوىٰ على قولهما. (البحر الرائق: ١٥٨/٦، كوئته)

وفى الفقه الحنفي في ثوبه الجديد: وجوزه الصاحبان إذا بين وصفه وموضعه، لأنه موزون معلوم، وبه قالت الأئمة الثلاثة، وعليه الفتوىٰ. (الفقه الحنفى فى ثوبه الجديد: ٢٨٩/٤، ما يجوز السلم فيه وما لا يجوز)

Furthermore, a group of jurists issued its fatwā on the basis of the verdicts of *Haqā'iq, 'Uyūn* and other books. For example:

فتح القدير: ٨٤/٧، دار الفكر. رد المحتار: ٢١٢/٥، سعيد. الفتاوى الهندية: ١٨٤/٣. شرح المجلة: ٤٠٠/٢.

وقد وجدت في مخطوطة عيون المذاهب للعلامة قوام الدين محمد بن محمد الكاكي، قال: ولا في لحم وعندهما والثلاثة يصح وبه يفتى. (مخطوطة عيون المذاهب، ص ١٠٠٥)

Allāh ta'ālā knows best.

Applying the rule of istisnā' in clothing

Question

A person gave an order to a factory in China to manufacture garments for him. He did not specify the time-limit. If this is classified as bay' istisnā', then the jurists say that istisnā' is impermissible. If it is bay' salam, the time-limit is not specified. What, then, is the nature of this transaction and what is the ruling for it?

Answer

This is a bay' istisnā' and societal norms are the basis for the jurists saying it is impermissible. In their time, istisnā' for garments was not a common practice. Whereas in our times, it is the norm to place an order for garments which are then manufactured accordingly. This is

why there ought to be a leeway for its permissibility. ʿAllāmah Fath Muhammad Sāhib Lucknowī rahimahullāh writes in *Takmilah ʿUmdah ar-Riʿāyah* that istisnāʿ is permissible in everything notwithstanding societal norms.

تكملة عمدة الرعاية:

قول مشايخنا إن الاستصناع فيما يتعامل الناس فيه كان في زمانهم أما في زماننا لا كفاية لنا عليه بل لا حاجة إليه، لكن المحتاج إليه أمر لا يعتاد الناس به بل لا يعرفه كما ترى في كثير من الآلات والأشياء التي يخترع ويؤمر به الصناعون وإن نهيناهم عنه يختل الأمر ويفضي إلى ما لا يسمع فوقها أحد من السامعين فضلاً عن الجاهلين ولذلك إشارة في ما ذكرناها لأن الآية ساكتة (أى آية المداينة) فصارت مطلقة والحديث (أى حديث صناعة المنبر) دال على ما هو حاجتي لأن العرب لا يعرفون المنبر حتى قالت امرأة: أجعل لك شيئاً تقعد عليه ووصفته وما ذكرته باسمه المنبر لأنه كان غير المعروف وأيضاً الخاتم المستصنع إن كانت مما يتعامل الناس فيه لكن النقش باسمه الشريف كان أمراً جديداً فهذا صريح مما لا يتعامل الناس فينبغي أن يجوز في كل ما يمكن ضبطها ووضعها. (تكملة عمدة الرعاية حاشية شرح الوقاية: ٨٣/٣، فصل فى الاستصناع، سعيد)

العرف والعادة فى راي الفقهاء:

فالفقه أن ما جرى العرف به صح استصناعه كالخفاف الأحذية والأواني وأثاث المنزل وعدد الحرب والثياب. وأما تصريح فقهائنا بأنه لا يجوز استصناع الثياب فذلك مبني على عرفهم، لأن الناس ما كانوا يتعاملون هذا النوع، وأما الآن فقد فشا هذا التعامل بين التجار والصناع فى البلدان. (العرف والعادة فى راي الفقهاء للدكتور احمد فهمى ابو سنة، ص ١٧٦)

شرح المجلة:

كل شيء تعومل استصناعه يصح فيه الاستصناع على الإطلاق. (شرح المجلة: ٤٠٣/٢، لمحمدالاتاسی)

الفقه الاسلامی وادلته:

وفی الفقه الإسلامي: اشترط الحنفية لجواز الاستصناع شروطاً ثلاثةً إذا فاتت أو فات واحد منها فسد العقد: (١) بيان جنس المصنوع ونوعه وقدره وصفته. (٢) أن يكون المصنوع مما يجري فيه تعامل الناس كالمصنوعات والأحذية... ويصح في عصرنا الحاضر الاستصناع فی الثياب لجريان التعامل فيه، والتعامل يختلف بحسب الأزمنة والأمكنة. (الفقه الاسلامی وادلته: ٣٠٨/٥، الشروط التی تلحقه، دار الفکر، الطبعة الرابعة)

ʿAllāmah Shāmī raẖimahullāh says that ijārah in garments has been made lawful by the scholars of Balkh on the basis of societal norms.

فتاوی الشامی:

بخلاف الاستصناع كان التعامل به جرى في كل البلاد، وبمثله يترك القياس ويخص الأثر، وفی العناية: فإن قيل لا نتركه بل يخص عن الدلالة بعض ما في معنى قفيز الطحان بالعرف كما فعل بعض مشايخ بلخ فی الثياب لجريان عرفهم بذلك. (فتاوی الشامی: ٥٩/٦، مطلب يخص القياس والاثر بالعرف العام، سعيد)

المحيط البرہانی:

ومشايخ بلخ كنصير بن يحيىٰ ومحمد بن سلمة وغيرہما كانوا يفتون بجواز ہذه الإجارة فی الثياب لتعامل أہل بلدہم فی الثياب والتعامل حجة يترك به القياس ويخص به الأثر. (المحيط البرہانی: ١٧٩/٩، رشيدية)

ʿItr Hidāyah:

According to Imām Abū Yūsuf ra<u>h</u>imahullāh, since the transaction becomes obligatory on account of isti<u>s</u>nāʿ, the precondition of the item being fully known becomes pointless. In fact, it is an obstacle to isti<u>s</u>nāʿ because, generally, only that thing is made which is of a new variety or of a specific appearance. If such things are removed from isti<u>s</u>nāʿ, the need for isti<u>s</u>nāʿ will not remain at all. The view of Imām Abū Yūsuf ra<u>h</u>imahullāh is supported by the narration where Rasūlullāh <u>s</u>allallāhu ʿalayhi wa sallam had a wooden pulpit made for Masjid-e-Nabawī, whereas before this, no one knew what a pulpit was nor was it used by anyone.[1]

Allāh taʿālā knows best.

When an item is not made according to the sample

<u>Question</u>

A person gave an order to a company to manufacture a certain item, but it did not make it according to the sample. Can he return it?

<u>Answer</u>

When an order is given for the manufacture of an item, it is defined as isti<u>s</u>nāʿ in the Sharīʿah. In an isti<u>s</u>nāʿ agreement, if the item is not made according to the sample, it is permissible to return it. Obviously, if it is made according to the sample, it cannot be returned.

إذا انعقد الاستصناع فليس لأحد العاقدين الرجوع وإذا لم يكن المصنوع على الأوصاف المطلوبة المبينة كان المستصنع مخيراً. (شرح المجلة لمحمد خالد الاتاسى، ٢/٤٠٦)

وفى شرح المجلة لسليم رستم باز اللبناني: قال: كان المستصنع مخيراً لفوات الوصف المرغوب فيه. (شرح المجلة، المادة: ٢٢١\٧٩٢: ١)

وفى الموسوعة الفقهية: وذهب أبو يوسف إلى أنه إن تم صنعه، وكان مطابقاً للأوصاف المتفق عليها، يكون عقداً لازماً، وأما إن كان غير مطابق لها فهو غير لازم عند الجميع لثبوت خيار فوات الوصف... واللجنة ترجح (أى قول

[1] *ʿItr Hidāyah*, p. 207.

أبي يوسف كما اختاره صاحب المجلة) وترى لزوم عقد الاستصناع، لما يترتب على استقلال أحد الطرفين بفسخه من المضار إلا إذا جاء على خلاف الوصف المتفق عليه. (الموسوعة الفقهية: ٣/٣٢٩)

Mālī Muʿāmalāt Parr Gharar Ke Atharāt:

The third view is that of Imām Abū Yūsuf rahimahullāh. He says that once the goods are manufactured as ordered, no one has the right to annul the transaction...The proof for this is that if the goods are manufactured as specified and either of the party is given the right to annul the transaction, it will entail a loss to the other...In the light of current conditions and situations, the view of Imām Abū Yūsuf rahimahullāh shows to be more practical. Several contemporary scholars have given preference to his view. Dr. Siddīq Muhammad al-Amīn ad-Darīr writes:

والعمل برأي أبي يوسف أولى من العمل بالرأيين الصحيحين فى المذهب في نظري لأنه لا ضرر فيه على المتعاقدين وهو أبعد عن الغرر. (الغرر واثره فى العقود، ص ٤٦٧)

Shaykh Mustafā Ahmad Zarqā writes:

لزم اختيار قول أبي يوسف في هذا مراعاة لمصلحة الوقت. (مجلة مجمع الفقه الإسلامي)

The Majmaʿ al-Fiqh al-Islāmī (Islamic Fiqh Academy, Jeddah) has also chosen the view of Imām Abū Yūsuf rahimahullāh in its resolution.[1]

Allāh taʿālā knows best.

When an order is given to construct a flat and it is not constructed

Question

A builder bought a plot of land and made plans to construct a fifteen-storey building. Zayd made an agreement with the builder to buy a flat on the tenth floor of this building. As per the details of the size, etc. of the flat, they agreed on a price of eight million. Zayd paid the full amount and it was agreed that the flat will be ready within three

[1] *Mālī Muʿāmalāt Parr Gharar Ke Atharāt*, pp. 67-71.

years. However, the construction did not start even after the passage of three years. The builder asked for an additional two-year respite. Zayd accepted. Now, after five years have passed, the builder is saying that the building will not be constructed, so Zayd must take back his eight million. Zayd is not happy about this because the land value has been increasing by the day, and it is difficult for him to obtain a similar flat at the same price. The builder said: "I will give you the money on the current market value." Zayd is insisting on having the flat. The builder said: "You look for a flat and I will pay the full amount for it." Zayd searched for a flat which was priced at twenty million. The builder said: "I will pay ten million and not more."

I have the following questions:

1. Is it permissible for Zayd to demand twenty million and take that amount?
2. Is it correct for Zayd to insist in this manner?
3. If the builder provides him with such a flat, is it right for him to accept it?
4. Is the builder bound by the Sharīʿah to provide a flat as demanded?

Most scholars are of the view that this is an istisnāʿ agreement, and that before the flat can be ready, Zayd can neither sell it to the builder nor to anyone else. The returning of the original amount is an annulment and an iqālah, which is permissible for the original price only. Therefore, it is not permissible for Zayd to accept twenty million. He can only take eight million.

The builder is now going around and showing this fatwā to various people. We need Hadrat's guidance on this issue. Kindly provide us with the ruling of the Sharīʿah.

Answer

When a person – Zayd in this case – gives an amount to a company and asks it to construct a building or flat for him, books the flat and concludes the agreement, then contemporary jurists include this transaction as an istisnāʿ. Whether the date is specified or not, this does not affect the istisnāʿ in any way according to the preferred view.

Shaykh Muhammad Khālid al-Atāsī writes:

ثم ما ورد التعامل فى استصناعه سواء كان مؤجلاً إلى شهر أو أزيد أو لم يكن مؤجلاً فالتأجيل يحمل على الاستعجال ولا يخرجه عن كونه استصناعاً، وهو قول الإمامين (أى الصاحبين) وعليه مشت هذه المادة لكونه أرفق. (شرح المجلة: ٤٠٣/١، مكتبة رشيدية، كوئٹہ)

After the specified period expired, the builder excused himself from building the flat in the agreed-upon place, and asked Zayd to take his money back; and he refused because he is suffering a major loss. He did not annul the transaction, and the builder does not have the right to enact a one-sided annulment. The builder will now have to give Zayd a similar flat. The following is stated in *Sharh̲ al-Majallah* with regard to bayʿ salam:

ولو انقطع عن أيدى الناس بعد الحلول قبل أن يوفى المسلم فيه فرب السلم بالخيار إن شاء فسخ العقد وأخذ رأس ماله وإن شاء انتظر وجوده أى المسلم فيه. (شرح المجلة: ٣٩٨/٢، مكتبة رشيدية)

Most of the rulings related to salam and istis̲nāʿ are the same. Here too, since he cannot be given the flat in the promised place, the builder will have to give him a similar one. Experts in this field know fully well what is defined as similar.

It is our view that the builder who was given the order should provide Zayd with a similar flat.

As for the builder going around and showing people the fatwā in which he states that he will return the original amount to Zayd – this can only be correct when Zayd accepts the annulment of the agreement. If Zayd asks for the flat or another one similar to it, the builder will have to provide it. Then, in reality, it is the builder who will give the flat to Zayd as promised. If the amount goes into Zayd's account due to legal obligations, this will not affect it in any way. When giving a similar flat, the builder will buy the flat and will be bound to give it over to Zayd after the conclusion of the purchase.

Allāh taʿālā knows best.

MISCELLANEOUS FORMS OF TRANSACTIONS

The method of bay' bi al-wafā'

Question

In our country, when a person's wife passes away, then in most cases he remarries. Sometimes, he may be in his seventies, but he will remarry. Generally, this person will marry a woman who is in her forties. Due to his old age, the man thinks to himself that when he passes away, his wife will not be able to live in their present house because his children from his previous marriage will take their shares from the house. The share which his wife will receive will not be enough for her to continue living in that house. Quite often, the husband makes a bequest of "accommodation" in favour of his wife. But the Sharī'ah does not allow a bequest in favour of an heir. If the husband were to give the house to his wife, it is considered to be a denial of the rights of his children. Since the house will go to the wife's heirs after her death and the husband's heirs will be deprived, is there any way the wife could live in that house with honour and respect for as long as she is living, and at the same time, maintaining the laws of Hanafī jurisprudence in this regard? And so that when she passes away, the house and other assets could be distributed among the husband's children.

Answer

One way in which the wife can continue living in that house is by practising on the ruling of 'umrā.[1] The husband will say: "As long as my wife is living, she will derive benefit from this house." In such a case, according to Imām Mālik rahimahullāh, the wife will have the right to live in that house for life.

بداية المجتهد:

والقول الثاني أنه ليس للمعمر فيها إلا المنفعة فإذا مات عادت الرقبة للمعمر أو إلى ورثته وبه قال مالك وأصحابه. (بداية المجتهد: ٢/٢٤٨، القول فى انواع الهبات)

[1] This is similar to the legal term known as "usufruct". (translator)

المغنى:

وقال مالک والليث: العمرىٰ تمليک المنافع لا تملک بها رقبة المعمر بحال ويکون للمعمر السکنىٰ فيه فإن مات عادت إلى المعمر. (المغنى: ٦/٣٠٤. وکذا فى الشرح الکبير: ٦/٢٦٥، بيروت)

Imām Qurtubī rahimahullāh writes:

وأما العمرىٰ فاختلف العلماء فيها على ثلاثة أقوال: أحدها أنها تمليک لمنافع الرقبة حياة المعمر مدة عمره فإن لم يذکر عقباً فمات المعمر رجعت إلى الذي أعطاها أو لورثته، هذا قول القاسم بن محمد ويزيد بن قسيط والليث بن سعد، وهو مشهور مذهب مالک، واحد اقوال الشافعي. (الجامع لاحکام القرآن: ٩/٣٩، سورة هود)

The Hanafī madh-hab does not have any form of ʿumrā – where the wife can continue benefiting for as long as she lives, and when she dies, the house goes to her husband's heirs. While remaining within the confines of the Hanafī madh-hab, one cannot apply the concept of ʿumrā and then return the house.

Yes, the concept of bayʿ bi al-wafā' can be applied in the Hanafī madh-hab.

In this case, the seller says to the buyer: "I am sending this item to you. You will have to return the sale-item (1) on a date specified by myself, (2) whenever I return the money to you, or (3) when my heirs return it to you." This must be in the form of a promise either before or after the sale. It is not good to lay down a condition. In such a case, after the wife passes away, her heirs will return the house while the heirs of the husband will return the money.

There are many different opinions on the permissibility and impermissibility of bayʿ bi al-wafā'. Nonetheless, the Hanafīs do have a view of permissibility. Bearing in mind the challenges of our times, leeway ought to be given to practise on this.

معجم لغة الفقهاء:

أن يبيع السلعة للمشري بالذي له عليه من الدين على أنه متى قضاه الدين عادت إليه السلعة. (معجم لغة الفقهاء، ص ١٣٧)

القاموس الفقهى:

بيع الوفاء عند الحنفية هو: أن يقول البائع للمشتري: بعت منك هذا الشيء بما لک علي من الدين على أني متى قضيت الدين فهو لي، وهو: أن يبيعه العين على أنه إذا رد عليه الثمن رد عليه العين ويسمى أيضاً بيع الطاعة. (القاموس الفقهى، ص ٣٨٤، حرف الواو، دمشق)

معجم المصطلحات:

بيع الوفاء فى اللغة: عرف الحنفية البيع بشرط أن البائع متى رد الثمن يرد المشتري المبيع إليه. ويسمى بيع الثنيا عند المالكية، والعهدة عند الشافعية والأمانة عند الحنابلة، ويسمى أيضاً بيع الطاعة، وبيع الجائز، وسمى في بعض كتب الحنفية بيع المعاملة. (معجم المصطلحات: ٤١٦/١)

شرح المجلة:

وإذا اتفق المشتري مع البائع على أنه يرد له المبيع إذا رد له مثل الثمن في وقت كذا ثم جاء الوقت وامتنع البائع عن رد مثل الثمن فإنه يؤمر ببيع المبيع وقضاء الثمن من ثمنه فإن أبى باعه الحاكم عليه. (شرح المجلة، ص ٢٢٣، للبنانى، فصل فى بيع الوفاء، المادة: ٣٩٦)

فتاوى الشامى:

حتى لم يملک المشتري بيعه من آخر ولا رهنه. (فتاوى الشامى: ٢٧٧/٥، مطلب فى بيع الوفاء، سعيد)

تبيين الحقائق:

ومن مشايخ سمرقند من جعله بيعاً جائزاً مفيداً بعض أحكامه منهم الإمام نجم الدين النسفي، فقال: اتفق مشايخنا في هذا الزمان فجعلوه بيعاً جائزاً مفيداً بعض أحكامه وهو الانتفاع به دون البعض وهو البيع، لحاجة الناس إليه ولتعاملهم فيه والقواعد قد تترك بالتعامل وجوز الاستصناع لذلك، وقال صاحب النهاية وعليه الفتوىٰ... وعندهما هذا البيع عبارة عن بيع غير لازم فكذلك وإن ذكر البيع من غير شرط ثم ذكر الشرط على وجه الميعاد جاز البيع ويلزمه الوفاء بالميعاد لأن المواعيد قد تكون لازمة. (تبيين الحقائق: ١٨٣/٥، كتاب الاكراه، ملتان)

Mullā ʿAlī Qārī rahimahullāh writes:

وتلفظا بتلفظ البيع بشرط الوفاء أو بالبيع الجائز... وإن ذكرا البيع من غير شرط ثم ذكرا الشرط على وجه الميعاد جاز البيع ويلزمه الوفاء بالميعاد لأن المواعيد قد تكون لازمة، قال رسول الله صلى الله عليه وسلم: "العدة دين" فيجعل هذا الميعاد لازماً لحاجة الناس إليه...وصورته: أن يقول البائع للمشتري: بعت منك هذه العين بألف درهم على أني لو دفعت إليك ثمنك تدفع العين إلي ثم قال ويسمىٰ هذا بيع الوفاء وهذا البيع موجود فى المصر يتعامل به ويسمونه بيع الأمانة. (شرح النقاية: ٢٥٣/٣، قبيل فصل الاقالة، بيروت)

الفتاوى البزازية:

وفي فوائد البرهان: تبايعا مطلقاً ثم ألحقا الوفاء يلتحق عند الإمام كإثبات الشرط المفسد وإسقاطه إذا لم يكن قوياً... وأجبر على الرد إذا أحضر الدين... وجعلناه كذلك لحاجة الناس إليه فراراً من الربا. (الفتاوى البزازية بهامش الهندية: ٤٠٨/٤، نوع فيما يتصل بالبيع الفاسد)

فتاوى قاضيخان:

وإن ذكر البيع من غير شرط ثم ذكرالشرط على وجه المواعدة جاز البيع ويلزمه الوفاء بالوعد لأن المواعدة قد تكون لازمة فتجعل لازمة لحاجة الناس. (فتاوى قاضيخان بهامش الهندية: ١٦٥/٢، فصل فى الشروط المفسدة)

فتاوى الشامى:

صح بيع الوفاء فى العقار استحساناً واختلف فى المنقول. وفى الشامية: وصح فى العقار باستحسان بعض المتأخرين. (فتاوى الشامى: ٢٧٩/٥، سعيد)

If either of the two parties passes away, his/her heirs will stand in for him/her with respect to the return of the item.

شرح المجلة:

إذا مات أحد المتبايعين وفاءً انتقل حق الفسخ للوارث. (شرح المجلة، للبنانى، ص ٢٢٦)

الفتاوى البزازية:

إذا باع باتاً أو وفاءً... فورثته يقومون مقامه في أحكام الوفاء. (الفتاوى البزازية: ٤١١/٤)

الدر المختار:

ولو باعه المشتري فللبائع أو ورثته حق الاسترداد وأفاد فى الشرنبلالية أن ورثة كل من البائع والمشتري تقوم مقام مورثها نظراً لجانب الرهن. (الدر المختار: ٢٧٨/٥، سعيد)

Fatāwā Bazzāzīyyah also states that this transaction is similar to an invalid transaction in some injunctions, and similar to valid transactions in some injunctions.

هذا البيع فاسد في حق بعض الأحكام حتى ملك كل منهما الفسخ وصحيح في حق بعض الأحكام حتى لم يملك الشارى بيعه من آخر ولا رهنه. (الفتاوى البزازية: ٤/٤٠٩، نوع فيما يتصل بالبيع الفاسد)

Hadrat Maulānā Muftī Taqī Sāhib writes:

In certain issues, latter day Hanafī jurists also state that a promise has to be obligatorily fulfilled by juridical decree, as in the case of bay' bi al-wafā'.[1]

The muftī of Thānah Bhawan Khānqāh and muftī of Pakistan, Shaykh al-Islam Hadrat Maulānā Zafar Ahmad Thānwī rahimahullāh writes in *Imdād al-Ahkām*:

One form of bay' bi al-wafā' is when the offer and acceptance is of a buying and selling transaction, and the offer and acceptance contain no prerequisite such as the right to return. Rather, the condition to return and other similar conditions must be made after the offer and acceptance. This is unanimously classified as permissible (لخلو العقد عن الشرط). When there is no precondition attached to the verbal offer and acceptance, writing a precondition attached to a written transaction will not make it impermissible.

لأن الأصل فى العقود القول والكتابة وثيقة، والله أعلم، حرره الأحقر ظفر أحمد عفى عنه.[2]

The above fatwā is ratified by a signature of Hadrat Maulānā Ashraf 'Alī Thānwī rahimahullāh.

We learn from the above answer that if the precondition of returning the item is not made in the offer and acceptance, and it is written down subsequently in the sale document, then it is totally permissible. Yes, because of the written agreement, it will be necessary to return it. After all, it is obligatory to fulfil a promise. Thus, if the husband sells the house to his wife and the condition of returning it is not mentioned in the transaction – rather, the condition of returning it is mentioned in writing – then it is undoubtedly permissible. In the case

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[1] *House Financing Ka Shar'ī Tarīqah*, p. 17; *Ghayr Shar'ī Bankārī*, pp. 242-254.

[2] *Imdād al-Ahkām*, vol. 3, p. 435.

of a sale, the two parties must stipulate a lesser price, and after the wife passes away, the money must be given to the husband's heirs.

In the previously-quoted text of Maulānā Zafar Ahmad Thānwī rahimahullāh, he classified that form of bay' bi al-wafā' in which no condition is attached to the acceptance and offer. In another place, he also permits a sale with a precondition if it is done out of necessity. He writes:

Bay' bi al-wafā' is defined as follows: A transaction is done with the condition that when the buyer returns the amount to the seller, it will be necessary for the seller to return the sale-item. It is essentially impermissible to conduct a transaction in this way, as per principles of the Sharī'ah.

فقد نهى رسول الله صلى الله عليه وسلم عن بيع وشرط. (رواه الطبراني بطريق أبي حنيفة وذكره عبد الحق في أحكامه وسكت عنه وأعله ابن القطان بأبي حنيفة كذا فى التخريج للزيلعى، قلت: وإعلاله رد عليه فليس مثل أبي حنيفة يعل به).

However, the Imāms differ on the permissibility of bay' bi ash-shart (a transaction with a condition attached to it). Imām Shāfi'ī rahimahullāh is of the view that bay' bi ash-shart is permissible in certain instances. This is also the view of Ibn Abī Laylā and Ibn Shabramah. The latter day jurists permit bay' bi al-wafā' on the basis of necessity so that people may be saved from usury.[1]

To sum up:

If the husband sells the house to his wife, it is permissible. Then there are two ways in which it can be made into a bay' bi al-wafā':

(1) After the verbal offer and acceptance, it must be stated either in writing or verbally, that when the price of the house is returned, (a) the time-period must be specified. For example, the amount will be returned after twenty years, then the house will also be returned. (b) Whenever the amount is returned, the house will be returned. This option cannot be a solution to the issue under discussion. (c) When the wife passes away, and the amount is returned, the house will be returned to the husband's heirs. Bear in mind that the wife is included among the heirs because this is like a mortgage.

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[1] *Imdād al-Ahkām*, vol. 3, p. 428.

(2) The condition of returning is included in the offer and acceptance. This has been classified as permissible by many scholars on the basis of necessity. Some say that it is impermissible. In such a case, it will be better to abstain.

Allāh taʿālā knows best.

The method of bay' 'aynah

Question

ʿUmar went to Zayd and asked him for a loan of ten thousand. Zayd declined, but said: "I have a machine which is valued at ten thousand. Buy it for thirteen thousand and you must pay me the amount after six months." ʿUmar bought the machine and then sold it either in the market or back to Zayd for ten thousand. What is the Sharīʿah ruling in this regard? Does the murābahah which is offered by banks fall under bayʿ ʿaynah?

Answer

The above transaction falls under bayʿ ʿaynah. This can take several forms:

1. Zayd lays down the condition in the very transaction that ʿUmar will resell the machine to him for ten thousand. This is impermissible for two reasons: (a) The laying down of the condition. (b) The seller sold it at a higher price and bought it at a lower price before the payment of the amount. (شراء ما باع بأقل مما باع قبل نقد الثمن)
2. Zayd sells the machine without any condition, promises to re-buy it or lays down a condition after the transaction is concluded. This is also impermissible because it falls under "the seller sold it at a higher price and bought it at a lower price" (شراء ما باع بأقل مما باع قبل نقد الثمن). This will be permissible if it is done after he pays the amount.
3. Zayd sells the machine to ʿUmar for thirteen thousand. ʿUmar then sells it to Bakr, and Bakr sells it to Zayd. Imām Muhammad and Imām Abū Yūsuf rahimahumallāh differ on this issue. Imām Muhammad rahimahullāh says:

هذا البيع في قلبي كأمثال الجبال ذميم اخترعه أكلة الربا. (شامى، كتاب الكفالة، ٣٢٦/٥، مطلب بيع العينة، سعيد)

Imām Mu<u>h</u>ammad ra<u>h</u>imahullāh says that this is impermissible.

ثم أن المستقرض يبيعها من غيره بأقل مما اشترى ثم ذلك الغير يبيعها من المقرض بما اشترى... وهذه الحيلة هي العينة التي ذكرها محمد. (فتاوى قاضيخان بهامش الهندية: ٢٧٩/٢، فصل فيما يكون فراراً من الربا)

Imām Abū Yūsuf ra<u>h</u>imahullāh is of the view that it is permissible. In fact, he says that it is a transaction which elicits reward. The jurists of Balkh also say that it is permissible.

وقال مشايخ بلخ بيع العينة في زماننا خير من البيوع التي تجري في أسواقنا وعن أبي يوسف أنه قال العينة جائزة مأجورة وقال أجره لمكان فراره من الحرام. (فتاوى قاضيخان بهامش الهندية: ٢٧٩/٢)

4. Zayd sells the machine to ʿUmar while the latter sells it to Bakr in the market. The machine does not go back to Zayd. Imām Mu<u>h</u>ammad says that this form is permissible.

ومالم ترجع إليه العين التي خرجت منه لا يسمى بيع العينة. (فتح القدير: ٢١٣/٧، دار الفكر)

Bayʿ ʿaynah is called this because the seller disregards giving a loan and prefers dealing with the ʿayn – the actual goods, or because the ʿayn (the goods) came back to the seller.

Those who says that bayʿ ʿaynah is impermissible do so on the basis of the following <u>H</u>adīth:

حدثنا حيوة بن شريح عن إسحاق أبي عبد الرحمن قال سليمان عن أبي عبد الرحمن الخراساني أن عطاء الخراساني حدثه أن نافعاً حدثه عن ابن عمر رضي الله عنه قال: سمعت رسول الله صلى الله عليه وسلم يقول: إذا تبايعتم بالعينة وأخذتم أذناب البقر ورضيتم بالزرع وتركتم الجهاد سلط الله عليكم ذلاً لا ينزعه حتى ترجعوا إلى دينكم. (رواه ابو داود: ٢٩١/٣، باب فى النهى عن العينة. والبيهقى فى سننه الكبرى، باب ما ورد فى كراهية التبايع، ٣١٦/٥، دائرة المعارف)

وفى الدراية في تخريج أحاديث الهداية: قال: وإسناده ضعيف، وله عند أحمد إسناد آخر أجود وأمثل منه ومن حديث عبد الله بن عمرو بن العاص رضي الله عنه نحوه عنده بإسناد ضعيف. (باب البيع الفاسد، ٢/١٥١، بيروت)

وفي نصب الراية: قال رواه أحمد، وأبو يعلى الموصلي، والبزار في مسانيدهم، قال البزار: وأبو عبد الرحمن هذا هو عندي إسحاق بن عبد الله بن أبي فروة، وهو لين الحديث انتهىٰ. قال ابن القطان في كتابه: وهذا وهم من البزار، وإنما اسم هذا الرجل إسحاق بن أسيد أبو عبد الرحمن الخراساني، يروي عن عطاء روي عنه حيوة بن شريح، وهو يروى عنه هذا الخبر، وبهذا ذكره ابن أبي حاتم، وليس هذا بإسحاق بن أبي فروة، ذاك مدني، ويكنى أبا سلمان، وهذا خراساني ويكنى أبا عبد الرحمن، وأيهما كان فالحديث من أجله لا يصح، ولكن للحديث طريق أحسن من هذا، رواه أحمد في كتاب الزهد: حدثنا أسود بن عامر ثنا أبو بكر بن عياش عن الأعمش عن عطاء بن أبي رباح عن ابن عمر رضي الله عنه قال: أتى علينا زمان، وما يرى أحدنا أنه أحق بالدينار والدرهم من أخيه المسلم، ثم أصبح الدينار والدرهم أحب إلى أحدنا من أخيه المسلم، سمعت رسول الله صلى الله عليه وسلم يقول: "إذا ضن الناس بالدينار والدرهم، وتبايعوا بالعينة، وتبعوا أذناب البقر، وتركوا الجهاد في سبيل الله، أنزل الله بهم ذلاً، فلم يرفعه عنهم حتى يراجعوا دينهم. انتهىٰ. قال وهذا حديث صحيح، ورجاله ثقات، انتهىٰ. حديث آخر: رواه أحمد في مسنده: حدثنا يزيد بن هارون عن أبي جناب عن شهر بن حوشب أنه سمع عبد الله بن عمرو عن رسول الله صلى الله عليه وسلم، فذكر نحوه. (نصب الراية لاحاديث الهداية: ٤/١٧، كتاب البيوع، بيروت)

To summarize the above: The Hadīth of Abū Dāwūd is weak while that of Ahmad (*Musnad*) is authentic.

If this Hadīth is authenticate, the prohibition of bayʿ ʿaynah will be established. However, this Hadīth does not apply to the fourth form [of the four above-listed forms]. Similarly, the murābahah which is practised by Islamic banks does not include this Hadīth because the sold item does not go back to the bank. Some scholars say that the essence of this Hadīth is the prohibition of becoming engrossed in worldly transactions while disregarding jihād. This can be supported by the fact that some of the narrations contain the word *zarʿ* (agriculture). In such a case, agriculture will also become unlawful; and no one says such a thing.

ʿAllāmah Saʿdī Chalpī writes in the marginalia of *Fath al-Qadīr*:

لو صح ذلك تكون الزراعة مذمومة أيضاً. (حاشية فتح القدير: ٢١٢/٧، دار الفكر)

وللاستزادة، انظر: (فتاوى الشامى: ٢٧٢/٥-٢٧٣، ٣٢٥، سعيد. وفتح القدير: ٢١٣/٧، دار الفكر.اعلاء السنن: ١٧٧/١٤، ادارة القرآن. والهداية: ١١٣/٣. والرسالة المسماة بـ "بيوع العينة والآجال" اعدتها استاذة مدرسة عائشة رضى الله تعالىٰ عنها، ط: كراتشى باكستان)

Allāh taʿālā knows best.

Bay' taljiyah

Question

What is bayʿ taljiyah, and what is its ruling?

Answer

This refers to a transaction where the buyer and seller – for whatever reason – enter into a transaction superficially while there is no transaction in reality. This is a type of joke. The ruling for it is that it is invalid.

قال الجرجاني: هو العقد الذي يباشره الإنسان عند ضرورة يصير كالمدفوع إليه، وصورته: أن يقول الرجل لغيره: أبيع داري منك بكذا فى الظاهر، ولا يكون بيعاً فى الحقيقة ويشهد على ذلك وهو نوع من الهزل.- وفى الإنصاف: عرفه بقوله: هو أن يظهرا بيعاً لم يريداه باطناً بل خوفاً من ظالم ونحوه.

ويعرف بعض الحنفية بيع التلجئة بأنه عقد ينشئه لضرورة أمر فيصير من المدفوع إليه. (معجم المصطلحات، ٤٠٥/١)

وفى الفتاوى الهندية: التلجئة هي العقد الذي ينشئه لضرورة أمر فيصير كالمدفوع إليه وأنه على ثلاثة أضرب أحدها أن تكون في نفس المبيع وهو أن يقول لرجل: إني أظهر أني بعت داري منک وليس ببيع فى الحقيقة ويشهد على ذلک ثم يبيع فى الظاهر فالبيع باطل والثاني أن تكون التلجئة فى البدل نحو أن يتفقا فى السر أن الثمن ألف ويتبايعان فى الظاهر بألفين فالثمن هو المذكور فى السر ويصير كأنهما هزلا فى الزيادة وروى أبو يوسف أن الثمن هو المذكور فى الظاهر، والثالث:أن يتفقا فى الباطن أن الثمن ألف درهم ويتبايعان فى الظاهر بمائة دينار، قال محمد القياس أن يبطل العقد وفى الاستحسان يصح بمائة دينار كذا فى الحاوي، وعن أبي حنيفة بيع التلجئة موقوف إن أجازاه جاز، وإن رداه بطل كذا فى التهذيب، ولو اتفقا أن يقرا ببيع لم يكن فأقرا بذلک فهو باطل ولا يجوز بإجازتهما كذا فى الحاوي. (الفتاوى الهندية: ٢٠٩/٣، باب فى البياعات المكروهة والارباح الفاسدة)

وبيع التلجئة وهو أن يظهرا عقداً وهما لا يريدانه يلجأ إليه لخوف عدو وهو ليس ببيع فى الحقيقة بل كالهزل كما بسطته في آخر شرحي على المنار. (الدر المختار: ٢٧٣/٥، بيع الفاسد)

وفى الدر المختار: ولم ينعقد مع الهزل لعدم الرضا بحكمه معه، وفى الشامية: الهزل فى اللغة: اللعب، وفى الاصطلاح: هو أن يراد بالشيء ما لم يوضع له ولا ما صح له اللفظ استعارة. فإن تواضعا على الهزل بأصل البيع: أى توافقا أنهما يتكلمان بلفظ البيع عند الناس ولا يريدانه واتفقا على البناء أى على أنهما لم

يرفعا الهزل ولم يرجعا عنه فالبيع منعقد لصدوره من أهله في محله، لكن يفسد البيع لعدم الرضا بحكمه فصار كالبيع بشرط الخيار أبدا. (الدر المختار مع رد المحتار: ٥٠٧/٤، مطلب فى حكم البيع مع الهزل، سعيد)

البيع الفاسد يفيد الحكم عند القبض إلا في أربع بيع الهازل... (شرح المجلة: ٢٠٧، للبنانى)

Qāmūs al-Fiqh:

A superficial transaction is known as bay' taljiyah. It means that no transaction takes place in reality, but for some reason, an impression is given that "I am buying such and such goods from that person." Alternatively, the price is shown to be more, while it is less in reality. Imām Mu<u>h</u>ammad ra<u>h</u>imahullāh says that this transaction is invalid. Imām Abū <u>H</u>anīfah ra<u>h</u>imahullāh says that it will be dependent on the permission of both parties. If both parties uphold the superficial transaction, the transaction will take place. If not, it will be non-existent.

وللاستزادة، انظر: (البحر الرائق: ٩٩/٦، فصل فى البيع الفاسد، بيروت. والمبسوط للامام السرخسى، باب التلجئة، ٢٢٦/٢٤. وفتاوى الشامى، مطلب فى بيع التلجئة، ٢٧٣/٥، سعيد. بدائع الصنائع: ١٧٦/٥. وقاضيخان: ٤٩٢/٣)

In short, bay' taljiyah is an invalid transaction. However, if the buyer and seller express their mutual agreement later on, the transaction will become valid. Like a transaction under compulsion (bay' al-mukrah).

Allāh ta'ālā knows best.

Bay' al-istijrār

<u>Question</u>

Two types of transactions are in vogue in certain places. I would like to know the Sharī'ah ruling on them.

1. A buyer gives an amount of money to the shopkeeper which the latter keeps with him. The buyer then purchases goods over a period of time until the amount which was given is

expended. The wrong which I see in this transaction is that the price of items is not known.

2. A buyer takes items from a shopkeeper over a period of time and uses them. After three months or at the end of each month, the shopkeeper informs him of the total amount which he is owing. The wrong which I see is that the items could have been used and finished. This would mean that it is bayʿ al-maʿdūm (the sale of a non-existent item).

What is the ruling of the Sharīʿah with regard to these two forms of transaction?

<u>Answer</u>

The first type could take two forms: (a) The seller informs the buyer of the price each time he takes the items. This is valid and correct without any doubt. (b) The seller does not inform the buyer of the price, but both parties have it in their minds that the price will be as per the current market rate. This too is permissible because it does not lead to dispute.

The second type is permissible on the basis of *istihsān* (application of discretion) because it is in vogue among people. It is also not a bayʿ al-maʿdūm in reality because the item is existent at the time of the transaction, and the buyer used it with the seller's permission. Assuming it was specified after it was non-existent, it will be classified as a permissible transaction on the basis of societal norms.

<u>معجم المصطلحات والالفاظ الفقهية:</u>

واصطلاحاً ما يستجره المشترى من البائع شيئاً فشيئاً ثم يدفع ثمن ما أخذه بعد ذلک. (معجم المصطلحات والالفاظ الفقهية، لمحمد عبد الرحمن عبد المنعم، ٤٠٣/١)

<u>التعريفات الفقهية:</u>

بيع الاستجرار: هو ما يستجره الإنسان من البياع إذا حاسبه على أثمانها بعد استهلاكها. (التعريفات الفقهية، ص ٢١٢)

فتاوى الشامى:

وفى الدر المختار: ما يستجره الإنسان من البياع إذا حاسبه على أثمانها بعد استهلاكها جاز استحساناً، وفى الشامية: قوله ما يستجره الإنسان... الخ. ذكر فى البحر: أن من شرائط المعقود عليه أن يكون موجوداً، فلم ينعقد بيع المعدوم ثم قال: ومما تسامحوا فيه، وأخرجوه عن هذه القاعدة ما فى القنية الأشياء التي توخذ من البياع على وجه الخرج كما هو العادة من غير بيع كالعدس والملح والزيت ونحوها ثم اشتراها بعد ما انعدمت صح. فيجوز بيع المعدوم هنا، وقال بعض الفضلاء: ليس هذا بيع معدوم إنما هو ضمان المتلفات بإذن مالكها عرفاً تسهيلاً للأمر ودفعاً للحرج كما هو العادة وفيه أن الضمان بالإذن مما لا يعرف في كلام الفقهاء حموي، وفيه أيضاً أن ضمان المثليات بالمثل لا بالقيمة والقيميات بالقيمة لا بالثمن.

قلت: كل هذا قياس، وقد علمت أن المسألة استحسان... وخرجها فى النهر على كون المأخوذ من العدس ونحوه بيعاً بالتعاطى، وأنه لا يحتاج في مثله إلى بيان الثمن لأنه معلوم... قلت: ما فى النهر مبني على أن الثمن معلوم، لكنه على هذا لا يكون من بيع المعدوم بل كلما أخذ شيئاً انعقد بيعاً بثمنه المعلوم قال فى الولوالجية: دفع دراهم إلى خباز، فقال: اشتريت منك مائة من خبز، وجعل يأخذ كل يوم خمسة أمناء فالبيع فاسد وما أكل فهو مكروه، لأنه اشترى خبزاً غير مشار إليه، فكان البيع مجهولاً ولو أعطاه الدراهم، وجعل يأخذ منه كل يوم خمسة أمناء ولم يقل فى الابتداء اشتريت منك يجوز وهذا حلال وإن كان نيته وقت الدفع الشراء لأنه بمجرد النية لا ينعقد البيع، وإنما ينعقد الآن بالتعاطي والآن المبيع معلوم فينعقد البيع صحيحاً، قلت: ووجهه أن ثمن الخبز معلوم فإذا انعقد بيعاً بالتعاطي وقت الأخذ مع دفع الثمن قبله، فكذا إذا تأخر دفع

الثمن بالأولى، وہذا ظاہر فیما کان ثمنہ معلوماً وقت الأخذ مثل الخبز واللحم. (فتاوی الشامی: ٤/٥١٦، سعید)

Islām Aur Jadīd Maʿāshī Masā'il:

Bayʿ al-istijrār is when a person takes items from a shopkeeper over a period of time, as and when he needs those items. Each time he takes the items, there is neither an offer and acceptance nor any discussion of the price.

This means that a person takes few items at a time from a shopkeeper and, after using them, he calculates the total amount which is owed and pays it to the shopkeeper. The crux of this is that there is an understanding between the person and the shopkeeper that whenever there is a need for anything in his house, he orders it from the shopkeeper. The latter provides the ordered items without the formality of an offer and acceptance, and without any discussion of the price. The person then uses the items. At the end of the month, whatever he had taken is calculated and the person pays the full amount at once...The latter day Hanafī jurists have permitted bayʿ al-istijrār even if no mention is made of the price of the goods at the time of taking them from the shopkeeper.[1]

وللاستزادة ، انظر: (البحرالرائق:٥/٢٥٩،کوئٹہ-اسلام اورجدیدمعاشی مسائل ، ازمفتی محمدتقی صاحب، ٣/ ٢٣٣-٢٥١،بیع الاستجرار)

Allāh taʿālā knows best.

Paying upfront for a periodical

Question

I am a subscriber to a Dīnī periodical. One year's subscription has to be paid upfront. Some people said to me that this entails buying something which is non-existent because the periodical is not present as yet. Rather, it will be printed every month. Is there any way that this transaction could be permissible? If we classify it as bayʿ salam, it will mean that the item has to be available at some place or the other in the market. Whereas, a future edition of the periodical is not found anywhere.

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[1] Islām Aur Jadīd Maʿāshī Masā'il, pp. 233, 237.

Answer

At the time of a bayʿ salam transaction, the item which is to be bought has to be found somewhere or the other in the market from the time of the transaction to the time when payment is made. This condition is laid down by Hanafī jurists only. The Shāfiʿīs have no such condition. Rather, the item has to be found at the promised time. Based on necessity, permission is given to practise on the Shāfiʿī madh-hab. ʿAllāmah Zafar Ahmad Thānwī rahimahullāh states this explicitly in *Imdād al-Fatāwā*:

The Hanafī scholars say that in a bayʿ salam, it is a prerequisite for the item to be available from the time of the agreement to the appointed time. If this prerequisite is not met, the bayʿ salam will not be permissible. However, Imām Shāfiʿī rahimahullāh is of the view that it will suffice if the item is at least available at the appointed time. (*al-Hidāyah*, vol. 3, p. 93) Thus, if this view is practised upon at the time of necessity, there will be no reproach; it is a concession.[1]

Dars al-Hidāyah:

Bearing in mind present-day challenges, the jurists say that – in matters related to these issues - if the fatwā is issued on the view of Imām Shāfiʿī rahimahullāh, then there is room for it so that the wealth of people may be protected against impermissibility.[2]

As per the opinions of these scholars, the issue under discussion can be referred to as bayʿ salam.

However, the fact of the matter is that this issue is similar to bayʿ al-istijrār which means: A person buys – over a period of time - various items by weight from a shopkeeper. He uses them as he receives them from the shopkeeper. Then at the end of a certain period, the entire amount is calculated and paid. This is permissible. In the present scenario, an amount is paid before hand. We will consider it to be a loan. In other words, the amount which was paid will be a debt on the shoulders of the madrasah [which is issuing the monthly periodical]. Then as the periodical is issued and sent to the subscriber, it will be concluded as a mutual giving and receiving.

[1] *Imdād al-Fatāwā*, vol. 3, p. 106.

[2] *Dars al-Hidāyah*, p. 329.

وفی الدر المختار: ما يستجره الإنسان من البياع إذا حاسبه على أثمانها بعد استهلاكها جاز استحساناً، وفی الشامية: قوله ما يستجره الإنسان...الخ. ذكر فی البحر: أن من شرائط المعقود عليه أن يكون موجوداً، فلم ينعقد بيع المعدوم ثم قال: ومما تسامحوا فيه، وأخرجوه عن هذه القاعدة ما فی القنية الأشياء التي توخذ من البياع على وجه الخرج كما هو العادة من غير بيع كالعدس والملح والزيت ونحوها ثم اشتراها بعد ما انعدمت صح. فيجوز بيع المعدوم هنا، وقال بعض الفضلاء: ليس هذا بيع معدوم إنما هو ضمان المتلفات بإذن مالكها عرفاً تسهيلاً للأمر ودفعاً للحرج كما هو العادة وفيه أن الضمان بالإذن مما لا يعرف في كلام الفقهاء حموي، وفيه أيضاً أن ضمان المثليات بالمثل لا بالقيمة والقيميات بالقيمة لا بالثمن.

قلت: كل هذا قياس، وقد علمت أن المسألة استحسان... وخرجها فی النهر على كون المأخوذ من العدس ونحوه بيعاً بالتعاطی، وأنه لا يحتاج في مثله إلى بيان الثمن لأنه معلوم... قلت: ما فی النهر مبني على أن الثمن معلوم، لكنه على هذا لا يكون من بيع المعدوم بل كلما أخذ شيئاً انعقد بيعاً بثمنه المعلوم قال فی الولوالجية: دفع دراهم إلى خباز، فقال: اشتريت منک مائة من خبز، وجعل يأخذ كل يوم خمسة أمناء فالبيع فاسد وما أكل فهو مكروه، لأنه اشترى خبزاً غير مشار إليه، فكان البيع مجهولاً ولو أعطاه الدراهم، وجعل يأخذ منه كل يوم خمسة أمناء ولم يقل فی الابتداء اشتريت منک يجوز وهذا حلال وإن كان نيته وقت الدفع الشراء لأنه بمجرد النية لا ينعقد البيع، وإنما ينعقد الآن بالتعاطي والآن المبيع معلوم فينعقد البيع صحيحاً، قلت: ووجهه أن ثمن الخبز معلوم فإذا انعقد بيعاً بالتعاطي وقت الأخذ مع دفع الثمن قبله، فكذا إذا تأخر دفع الثمن بالأولى، وهذا ظاهر فيما كان ثمنه معلوماً وقت الأخذ مثل الخبز واللحم. (فتاوى الشامی: ٥١٦/٤، سعيد)

شرح المجلة:

وہذا إذا كان ثمن ما يستجره معلوماً لدى المتبايعين بأن بيناه قبل الاستجرار، أو كان معلوماً عند كل الناس كالخبز واللحم، وأما إذا كان مجهولاً فلا يصح تخريجہ على بيع التعاطى كما لا يخفى. (شرح المجلة لمحمد الاتاسی، مادة ٢،١٧٥\٤٠)

مؤطا امام مالک:

ولا بأس بأن يضع الرجل عند الرجل درہماً ثم يأخذه منہ بثلث أو بربع أو بكسر معلوم سلعة معلومة. (مؤطا امام مالک، ص ٥٩٠، باب جامع بيع الطعام)

شرح المجلة:

ويصح البيع بالتعاطي فی الخسيس والنفيس على ما ہو المعتمد ويصح أيضاً ولو كان الإعطاء من أحد الجانبين فقط وبہ يفتى وصورتہ أن يتفقا على الثمن ثم يأخذ المشتري المتاع ويذہب برضا صاحبہ من غير أن يدفع الثمن أو أن يدفع المشترى الثمن للبائع ويذہب بدون قبض المبيع فإن البيع لازم على الصحيح... وفی الدر المختار: ما يستجره الإنسان من البياع كالزيت والعدس والملح وما شاكل إذا حاسبہ على أثمانها بعد استهلاكها جاز استحساناً. (شرح المجلة، المادة: ١\٨٠، ١٧٥، لسليم رستم باز اللبنانی)

بحوث فی قضايا فقہية معاصرة:

أما بيع الاستجرار فہو مأخوذ من قولہم: استجر المال: إذا أخذه شيئاً فشيئاً، وہو فی اصطلاح الفقہاء المتأخرين أن يأخذ الرجل من البياع الحاجات

المتعددة شيئاً فشيئاً، دون أن يجرى بينهما مساومة أو إيجاب وقبول في كل مرة،

والاستجرار على نوعين: الأول: الاستجرار بثمن مؤخر.

والثاني: الاستجرار بمبلغ مقدم.

وأما النوع الثاني من الاستجرار، فهو أن المشتري يدفع إلى البائع مبلغاً مقدماً، ثم يستجر منه الأشياء، وتقع المحاسبة بعد أخذ مجموعة من الأشياء في نهاية الشهر أو في نهاية السنة مثلاً -- ويخرج على ہذا اشتراک المجلات الدورية فإن العادة في عصرنا أن الناس يدفعون بدل الاشتراک السنوي في بداية كل سنة إلى أصحاب ہذه الدوريات وأنہم يبعثون إليہم نشرة من المجلة فی كل شہر فبدل الاشتراک قرض مضمون عندہم، ويقع بيع كل عدد من المجلة عند ما تصل المجلة إلى المشتري، فلو انقطعت المجلة في أثناء السن لزم على أصحابها رد ما بقي من بدل الاشتراک. (بحوث فی قضايا فقہية معاصرة، ١/٥٥، ٦٦، ٦٩، بيع الاستجرار)

Further reading: *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 3, pp. 231-250; *Fatāwā ʿUthmānī*, vol. 3, p. 112.

A transaction of a similar nature has been mentioned by Hadrat Maulānā Thānwī rahimahullāh (*Imdād al-Fatāwā*, vol. 3, p. 132).

وللاستزادة: انظر: (رد المحتار: ٥١٦/٤، سعيد، والبحر الرائق: ٢٥٩/٥، والفقہ الحنفی فی ثوبہ الجديد: ٤٧/٤، بيع التعاطی والاستجرار، وغرر کی صورتيں، ص٢٨٣-٢٩٥)

Allāh taʿālā knows best.

Paying a butcher before-hand

Question

I like the trotters of cows and buffaloes. I gave a butcher one thousand rupees and asked him to give me ten rupees worth of cow or buffalo

trotters daily. Some people say that this entails buying something which is non-existent, and is therefore impermissible. Is this so?

Answer

This transaction is permissible. Detailed references can be found in the previous fatwā. Repeating it will be too laborious.

Further reading: *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 122.

Allāh taʿālā knows best

Auctions

Question

Do the jurists permit auctions?

Answer

The majority of scholars say that it is permissible to sell by auctioning an item. Imām Auzāʿī and Imām Is-hāq rahimahumallāh say that it is permissible only in the distribution of booty and inheritance. Ibrāhīm Nakhaʿī rahimahullāh says that it is makrūh. This transaction is also described as bayʿ muzāyadah, nīlām, harāj, and so on.

عن أنس بن مالک رضي الله عنه أن رسول الله صلى الله عليه و سلم باع حلساً وقدحاً وقال: من يشتري ہذا الحلس والقدح، فقال رجل: أخذتهما بدرہم، فقال رسول الله صلى الله عليه وسلم: من يزيد على درہم فأعطاه رجل درہمين فباعها منہ، ہذا حديث حسن. (رواه الترمذی فی باب ما جاء فی بیع من يزيد: ۲۳۱/۱)

Rasūlullāh sallallāhu ʿalayhi wa sallam auctioned a saddle blanket and a bowl. One person was prepared to pay one dirham. Rasūlullāh sallallāhu ʿalayhi wa sallam asked: "Who is prepared to pay a higher price?" Another person said: "I will give two dirhams." Rasūlullāh sallallāhu ʿalayhi wa sallam gave it to the second person.

روي عن رسول الله صلى الله عليه وسلم لا يستام الرجل على سوم أخيه،... والنہي لمعنى في غير البيع وہو الإيذاء فكان نفس البيع مشروعاً فيجوز شراؤه ولكنه يكره، وہذا إذا جنح البائع للبيع بالثمن الذي طلبه المشترى الأول فإن

كان لم يجنح له فلا بأس للثاني أن يشتريه، لأن هذا ليس استياماً على سوم أخيه فلا يدخل تحت النهي، ولانعدام معنى الإيذاء أيضاً، بل هو بيع من يزيد وأنه ليس بمكروه، لما روي أن رسول الله صلى الله عليه وسلم "باع قدحاً وحلساً له ببيع من يزيد" وما كان رسول الله صلى الله عليه وسلم ليبيع بيعاً مكروهاً. (بدائع الصنائع، كتاب البيوع، فصل فى صفة البيع الذى يحصل به التفريق، ٢٣٢/٥، سعيد)

وللاستزادة انظر: (العناية فى شرح الهداية، فصل فيما يكره من البيوع، بهامش فتح القدير: ٤٧٩/٦. وتبيين الحقائق: ٦٧/٤، دار الكتب الاسلامى، والدر المختار مع رد المحتار: ١٠٢/٥، باب البيع الفاسد، سعيد. والمغنى لابن قدامة الحنبلى، فصل لا يسوم الرجل على سوم اخيه)

Allāh taʿālā knows best.

THE SALE OF RIGHTS

Selling the right to drinking water

<u>Question</u>

What is the ruling with regard to selling water from a river for the sake of irrigating a farm? People generally pay for this water whereas it is in conflict with the Hadīth:

الناس شركاء في ثلاث الماء والكلاء والنار.

> People have equal rights with respect to three things; water, grass and fire.

<u>Answer</u>

Water which is generally used for irrigating farms is provided by the government. The government collects it from various sources and stores it in its reservoirs. The cost of these reservoirs amounts to millions. Furthermore, only clean water which has been purified by chemicals is stored in these reservoirs. Based on these fundamental reasons, it will be permissible to sell this water. The 'ulamā' clearly state that if a person stores water in his pond which belongs to him, he becomes the owner of that water. He may sell it.

<u>الفتاوى الهندية:</u>

وأما بيع ماء جمعه الإنسان في حوضه، ذكر شيخ الإسلام المعروف بـ خواهر زاده في شرح كتاب الشرب :إن الحوض إذا كان مجصصاً أو كان الحوض من نحاس أو صفر جاز البيع على كل حال وكأنه جعل صاحب الحوض محرز الماء بجعله في حوضه. (الفتاوى الهندية، باب بيع الماء، ١٢١/٣. وكذا فى المحيط البرهانى، فصل فى ما يجوز وما لا يجوز، ٣٦٩/٦)

<u>بدائع الصنائع:</u>

وكذا السقاءون يبيعون المياه المحروزة فى الظروف به جرت العادة فى الأمصار وفي سائر الأعصار من غير نكير فلم يحل لأحد أن يأخذ منه فيشرب من غير إذنه. (بدائع الصنائع: كتاب الشرب، ١٨٨/٦، سعيد)

Water which is drawn from rivers in the form of streams do not have a dam which the government arranges to dig and clean. It is permissible for the government to sell this water as well. It falls under the category of bay' ash-shurb whose sale is permissible provided its quantity is known and the amount of water which will flow from it is known. If the quantity is unknown but it does not result in dispute, then it will also be permissible on the basis of common usage.

فتاوى الشامى:

قوله ولا بيع مسيل الماء، هذا أيضاً يحتمل بيع رقبة المسيل وبيع حق التسييل... وأما المسيل فمجهول لأنه لا يدرى قدر ما يشغله من الماء، قال فى الفتح: ومن هنا عرف أن المراد ما إذا لم يبين مقدار الطريق والمسيل، أما لو بين حد ما يسيل فيه الماء أو باع أرض المسيل من نهر أو غيره من غير اعتبار حق التسييل فهو جائز بعد أن يبين حدوده. (فتاوى الشامى: ٧٩/٥، مطلب فى بيع المسيل، سعيد. وكذا فى فتح القدير: ٤٢٩/٦، دار الفكر)

وفى العناية في شرح الهداية: بخلاف الشرب حيث يجوز بيعه تبعاً للأرض باتفاق الروايات، ومفرداً في رواية وهو اختيار مشايخ بلخ لأنه حظ من الماء لوجوب الضمان بالإتلاف فإن من سقى أرض نفسه بماء غيره يضمن، ولأن له حظاً من الثمن ذكره فى كتاب الشرب... وانما لم يجز بيع الشرب وحده في ظاهر الرواية للجهالة لا باعتبار أنه ليس بمال. (شرح العناية بهامش فتح القدير: ٤٢٨/٦، دار الفكر)

وقال المحقق ابن همام: جوزه مشايخ بلخ... لأن أهل بلخ تعاملوا ذلك لحاجتهم إليه، والقياس يترك بالتعامل كما جوز السلم للضرورة والاستصناع للتعامل. (فتح القدير: ٤٢٨/٦، باب البيع الفاسد، دار الفكر)

المبسوط:

قال وكان شيخنا الإمام يحكي عن أستاذه أنه كان يفتي بجواز بيع الشرب بدون الأرض ويقول فيه عرف ظاهر في ديارنا بنسف فإنهم يبيعون الماء فللعرف الظاهر كان يفتي بجوازه. (المبسوط للامام السرخسى: ١٣٦/١٤، باب الشفعة فى الارضين والانهار، ادارة القرآن. وكذا فى: ١٧١/٢٣)

الفتاوى السراجية:

بيع الشرب تبعاً للأرض جائز، مقصوداً كذلك فى رواية، وبه أخذ مشايخ بلخ. (الفتاوى السراجية، ص: ٤١٥، كتاب البيوع باب ما يجوز بيعه وما لا يجوز)

وللإستزادة: (شرح المجلة ، لمحمد خالد الاتاسى، ١٢١/٢. وجديد فقهى مباحث، جلد سوم)

Objection

Someone may object by saying that qiyās can be left aside on the basis of common usage but a Hadīth cannot be left aside on this basis. Here there is a clear text for prohibition. What is the answer?

Answer

The author of *al-Hidāyah* makes reference to this answer. He says that this is not a sale of water but a sale of a share of water. In other words, a portion of water is separated, arrangements are made for it, pipes are laid, a recompense is taken for the pipeline, etc. This water did not collect at a place on its own. Rather, arrangements were made for it. The recompense which is collected is in return for these arrangements, and this is permissible. It is not related to what the Hadīth states.

Allāh taʿālā knows best.

The sale of "goodwill" and "trademark"

Question

Does the Sharīʿah permit the sale of "goodwill" and "trademark"?

Answer

With the progress in trade in the modern age, the issue of brand names and trademarks has cropped up. A trader or company manufactures an item and attaches its name or logo to it. The purpose of which is for the item to be recognized in the market – that it has been made by a certain company – and people to develop an interest in it. When a company produces quality goods, it gradually develops a special standing. When the issue of the general public being duped [by counterfeit goods] came up, governments instituted the registration of trademarks. Consequently, other companies are prohibited from using the names, trademarks, logos, etc. of those companies which had them registered. If other companies use the trademarks of a certain company, it would entail a major deception, and buyers will also be duped.

An important rule of the pure Sharī'ah is that a person should not do anything which would be a cause of deception for others. Therefore, registration of this nature is exactly in line with the Sharī'ah. Since it is a preservation of a right, and economic benefits are attached to the popularity of a certain brand-name, it has been classified as wealth, and it can therefore be bought and sold.

The jurists give various definitions for *māl* (wealth).

فتاوى الشامى:

المراد بالمال ما يميل إليه الطبع ويمكن ادخاره لوقت الحاجة، والمالية تثبت بتمول الناس كافة أو بعضهم والتقوم يثبت بها وبإباحة الانتفاع به شرعاً... وفى البحر عن الحاوي القدسي: المال اسم لغير الآدمي خلق لمصالح الآدمي، وأمكن إحرازه والتصرف فيه على وجه الاختيار. (فتاوى الشامى: ٥٠١/٤، مطلب فى تعريف المال، سعيد)

The marginalia of *Majma' al-Anhur*:

والمراد بالمال عين يجري فيه التنافس والابتذال. (الدرر المنتقى بهامش مجمع الانهر: ٣/٢)

'Allāmah Abū Bakr Kāsānī rahimahullāh:

منها أن يكون مالاً... وسواء كان المال عيناً أو منفعة عند عامة العلماء. (بدائع الصنائع: ٣٥٢/٧، كتاب الوصايا، سعيد. وكذا فی كتاب الصلح، ٤٢/٦، سعيد)

From the above text, ʿAllāmah Kāsānī also classifies "benefit" as wealth.

Shaykh Mustafā Zarqā rahimahullāh has been quite general in his definition of wealth.

والتعريف الصحيح يمكن أن يستنبط من مجموع ما ذكره الفقهاء عن المال وخصائصه في مختلف المناسبات، فقد قالوا: إن المال اسم لغير الآدمي... الخ. (المدخل الفقهی العام: ١١٥/٣)

Shaykh Mustafā Zarqā rahimahullāh said:

If we were to give a correct definition of *māl* (wealth) after observing the views of the jurists and after considering the specifications for different occasions and situations, we will say: Māl refers to all things apart from man.

Maulānā Khālid Sayfullāh Rahmānī said: Three fundamental elements are required for something to be classified as māl:

(1) It must be mubāh (permissible) according to the Sharīʿah.

(2) Benefit can be derived from it.

(3) Its sale and purchase has become common practice in society.

We will not be exaggerating in saying that all four juridical schools concur on this definition.[1]

Maulānā ʿUmar ʿĀbidīn Qāsimī writes:

The crux of this entire discussion is:

1. The majority of jurists concur that in addition to wealth, the sale and purchase of benefits and rights is also permissible.
2. If it was necessary for māl to be present in a transaction, then after studying the texts of the jurists, we learn that in māl itself, rights and benefits are included. This is not the view of

[1] *Jadīd Fiqhī Masā'il*, vol. 4, p. 171.

the other three Imāms alone, but parallel statements are to be found among the Hanafī jurists as well.

Refer to:

فتح القدير: ٤٢٩/٦، بيع الطريق وهبته، دار الفكر. والدر المختار: ١٣٢/٤، سعيد. وفتاوى الشامى: ٨٠/٥، وصح بيع حق المرور...الخ، سعيد. والعناية بهامش فتح القدير: ٤٢٩/٦، دار الفكر. والفتاوى الهندية: ١٣١/٣، ٢٩٤/٦. وتبيين الحقائق: ٥٢/٤، ملتان. ومنحة الخالق: ٢٣٤/٥-٢٣٥، كوئته.

3. Societal norms and practices are of fundamental importance when classifying something as māl.
4. There is no single form for specifying whether a thing can be stored or not. If something is protected legally, then this is sufficient for it to be storable.[1]

Hadrat Maulānā Ashraf ʿAlī Thānwī rahimahullāh writes:

Every person has the right to give a name to his business. However, if a person names his business "ʿItr Satān" or "Gulshan Adab", and commercial benefits become attached to that name, then another person does not have the right to keep that name. When the aim of a specific name is the acquisition of wealth and trade in the future, then collecting goodwill is permissible.[2]

Hadrat Muftī Muhammad Taqī ʿUthmānī Sāhib writes:

The sale of rights ought to be permissible with the following conditions:

1. The right is established at present and not envisaged in the future.
2. The right is intrinsically established in favour of the person who holds the right. For example, retribution, inheritance, etc. It is not a right merely for the sake of repulsing a harm, e.g. the right of shufʿah, khiyār-e-mukhayyarah, etc.
3. The right is transferable.
4. It is does necessitate gharar or ignorance.

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[1] *Huqūq Aur Oen Kī Kharīd Wa Faraukhat*, p. 141.

[2] *Imdād al-Fatāwā*, vol. 3, p. 120.

5. It is treated as a commodity among traders in their transactions.[1]

Some latter day scholars say that instead of its sale and purchase, it will be better to collect a remuneration for giving up the right. They based this on the issue of *nuzūl ʿan al-waẕāʾif*. Observe the following:

وفى الأشباه: لا يجوز الاعتياض عن الحقوق المجردة كحق الشفعة، وعلى ہذا لا يجوز الاعتياض عن الوظائف بالأوقاف، وفيها في آخر بحث تعارض العرف مع اللغة: المذہب عدم اعتبار العرف الخاص، لكن أفتى كثير باعتباره، وعليہ فيفتى بجواز النزول عن الوظائف بمال. (الدر المختار: ٥١٨/٤، ٥١٩، سعيد. وكذا فى الاشباه: ٢٨٦/١)

وفى "الفقہ الحنفي في ثوبہ الجديد": فالسوال الآن: ہل يجوز بيع الاسم التجاري أو العلامة التجارية؟

وظاہر أن الاسم والعلامة ليس عيناً مادياً، وإنما ہو عبارة عن حق استعمال ہذا الاسم أو العلامة، وہذا الحق ثبت لصاحبہ إصالة بحكم الأسبقية والتسجيل الحكومي، وہو حق ثابت فى الحال، وليس متوقعاً فى المستقبل، وہو حق يقبل الانتقال إلى آخر، ولكنہ ليس حقاً ثابتاً في عين قائمة، فعلى ضوء القواعد التي استخلصناہا من كلام الفقہاء ينبغي أن يجوز الاعتياض عنہ عن طريق التنازل دون البيع - وبہذا أفتى شيخ مشايخنا العلامة أشرف على التہانوى وقاسہ على مسألة النزول عن الوظائف بمال، وحكى فيہ عبارة ابن عابدين التي نقلہا في مسألة النزول عن الوظائف. (الفقہ الحنفى فى ثوبہ الجديد: ٣٧/٤، بيع الاسم التجارى والعلامة التجارية، دمشق)

Imdād al-Fatāwā:

The name of a factory is similar to *ẖaqq-e-waẕāʾif* – it is intrinsically established and not for the repulsing of harm. Both are – in practice –

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[1] *Fiqhī Maqālāt*, vol. 1, p. 192.

supplementary matters, and both are means for acquiring wealth in the future. Based on this, it seems that there is room to permit the giving of a payment or reimbursement. Although it is against piety for the person to accept the payment, it will be permitted in the case of necessity.[1]

Reference to this is made in a text of *al-Hidāyah*:

وإذا أقعد الخياط أو الصباغ في حانوته من يطرح عليه العمل بالنصف فهو جائز لأن ہذه شركة الوجوه فی الحقيقة فہذا (الخياط أو الصباغ) بوجاہته يقبل (أی العمل من الناس) وہذا (أی من يطرح عليه العمل) بحذاقته يعمل فينتظم بذلک المصلحة فلا تضره الجہالة فيما يحصل. (الہداية: ٣١٧/٣، كتاب الاجارة)

In other words, just as status, popularity and eagerness are means in whose return it is permissible to take a payment – i.e. māl or wealth – in the same way, a business name or business logo is also a means of popularity and eagerness. It will therefore be permissible to accept payment in exchange for it.

To sum up, if a trademark or goodwill is formally registered with the government, its sale and purchase will be permissible; and it will also be permissible to accept a reimbursement for it.

Further reading: *Jadīd Fiqhī Masā'il*, vol. 4, pp. 158-190; *Jadīd Fiqhī Mabāhith*, vol. 3; *Fiqhī Maqālāt*, vol. 1, pp. 159-228; *Huqūq Aur Oen Ka Kharīd Wa Faraukhat* of Maulānā ʿUmar ʿĀbidīn Qāsimī; *Nizām al-Fatāwā*, vol. 2, p. 314; *Fatāwā Haqqānīyyah*, vol. 6, p. 67.

Allāh taʿālā knows best.

The Sharī'ah status of haqq-e-suknā

Question

The author of *al-Hidāyah* says that the sale of *haqq al-murūr* is permissible. The sale of *haqq as-suknā* is classified as impermissible as stated in the marginalia of *al-Hidāyah*. The sale of *haqq as-suknā* is quite common nowadays. Is it permissible?

[1] *Imdād al-Fatāwā*, vol. 3, p. 119.

Answer

Pagrī is also a type of sale and purchase of rights and benefits. Its practice has now spread from the cities to the villages. It is especially common in large and central cities. In some places it is referred to as *salāmī*. In the Arabic language is referred to as *jalsah*, and more commonly, *khulūw*.

When a house or shop is given on rent, then in addition to the monthly rental, the tenant has to make a once-off payment. After paying this amount, the tenant enjoys the right to live in that house for the rest of his life.

One challenge for the tenant was that there were times when he had to suddenly empty the house/shop and return it. For example, a tenant opens a shop and his business becomes well-established. If the landlord were to ask him to vacate the shop, it would be a severe test for him and probably impossible to make up for the financial loss.

Qāḏī Mujāhidul Islām S̲āh̲ib Qāsimī rah̲imahullāh writes:

If the silent approval of societal norms was put into words, it would mean that when a landlord collects *pagrī* from a tenant at the time of renting a property to him, then while he has maintained his ownership right, he has sold the right of occupation. This right of the tenant cannot be seized by the landlord. It will also be transferred to the tenant's heirs. The tenant may sell this right if he wants.[1]

ʿAllāmah Ibn Nujaym rah̲imahullāh is inclined to permitting this practice. He says that Sulṯān Ghaurī constructed the shops of Jamlūn in Ghaurīyyah. He then gave occupation of them to the traders with the right of *khulūw*. A certain amount was laid down for each businessman. The Sulṯān collected this amount from them and recorded it in the endowment register.

والحاصل أن المذهب عدم اعتبار العرف الخاص، ولكن أفتى كثير من المشايخ باعتباره، فأقول على اعتباره: ينبغي أن يفتى بأن ما يقع في بعض أسواق القاهرة من خلو الحوانيت لازم، ويصير الخلو فى الحانوت حقاً له، فلا يملك صاحب الحانوت إخراجه منها، ولا إجارتها لغيره، ولو كانت وقفاً وقد وقع في حوانيت الجملون بالغورية أن السلطان الغوري لما بناها أسكنها للتجار

[1] *Majallah Fiqh Islāmī*, vol. 1, p. 83, Islamic Fiqh Academy, India.

بالخلو، وجعل لكل حانوت قدراً أخذه منهم، وكتب ذلك بمكتوب الوقف. (الاشباه والنظائر: ٢٨٦/١-٢٩١، تحت القاعدة: العادة محكمة، ادارة القرآن. وكذا فى فتاوى الشامى: ٥٢١/٤، مطلب فى خلو الحوانيت، سعيد)

وفي رد المحتار: قال البدر القرافي من المالكية: إنه لم يقع في كلام الفقهاء التعرض لهذه المسألة، وإنما فيها فتيا للعلامة ناصر الدين اللقانى المالكى بناها على العرف وخرجها عليه وهو من أهل الترجيح فيعتبر تخريجه، وإن نوزع فيه وقد انتشرت فتياه فى المشارق والمغارب وتلقاها علماء عصره بالقبول. وفى الخيرية (للشيخ الرملى الحنفى ما يفيد أن الخلاف في هذه المسألة معتبر يعني خلاف الذي أفتى به من المالكية وهو الشيخ ناصر الدين اللقانى ومن تابعه) قال: ليقع اليقين بارتفاع الخلاف بالحكم حيث استوفى شرائطه من مالكي يراه أو غيره صح ولزم وارتفع الخلاف خصوصاً فيما للناس إليه ضرورة لاسيما فى المدن المشهورة كمصر ومدينة الملك (إستانبول) فإنهم يتعاطونه ولهم فيه نفع كلي ويضر بهم نقضه وإعدامه... ألا ترى ما فعله الغوري كما مر... وممن أفتى بلزوم الخلو الذي يكون بمقابلة دراهم يدفعها للمتولي أو المالك العلامة عبد الرحمن آفندى العمادى صاحب هدية ابن العماد، وقال فلا يملك صاحب الحانوت إخراجه ولا إجارتها لغيره ما لم يدفع له المبلغ المرقوم، فيفتى بجواز ذلك للضرورة قياساً على بيع الوفاء الذي تعارفه المتاخرون احتيالاً على الربا. (فتاوى الشامى: ٥٢١/٤، ١٢٢، ١٢٣، ملخصاً، سعيد)

A few doubts and answers to them

1. Some jurists say that it is impermissible. Their reasoning is that it is not wealth; and it is impermissible to take a recompense for non-wealth, i.e. rights. Furthermore, it is not possible to acquire benefit from it. This is why it is impermissible.

The fact of the matter is that societal norms and common practices play a major influence in deciding whether something can be classified as wealth or not. It is solely through societal norms that a thing

acquires value and becomes something of use. Countless examples of this can be found in the books of jurisprudence. In our times, rights have taken on the status of a valuable asset. It is common practice to receive remuneration in exchange for a right. Therefore, while classifying it as wealth, it will be permissible to accept a remuneration in exchange for it or to engage in its sale and purchase.

إن البيع مبادلة المال بالمال، وليست الحقوق المجردة مالاً متقوماً حتى يصح بيعها، وإنما هو نزول عن ذلك الحق الثابت له للغير بمال معلوم، أفتى بعض المتاخرين من العلماء بجوازه، فمنهم من استند في جوازه إلى أنه قد تعورف ذلك في بعض البلدان، والعرف الخاص قد اعتبره كثيرمن العلماء، ومنهم من استند فى ذلك إلى إلحاقه بنظائره المنصوص على جواز أخذ البدل فيها كحق القصاص وحق النكاح وحق الرق فإنه قد جاز أخذ البدل فيها مع أنهما حقوق فألحق بها النزول عن الوظائف. (شرح المجلة: ١٢٠/٢، تتمة)

وفى العرف والعادة فى رأي الفقهاء: والذي يشهد له إطلاق أدلة الشرع أن المنافع قسم من المال، ثم ذكر بعد أسطر:

والحاصل أن كل ما لا ينتفع به فليس بمال، أما ما يجري فيه البذل والمنع وينتفع به ولو بحسب المآل فإنه يصح بيعه متى قومه الشرع وأباح الانتفاع به، ولهذا جوزوا بيع النحل ودود القز والعلق مع أنها من الهوام للانتفاع بها... ومن هذا يتبين أن مقايس المالية تعارف الناس أن هذا الشيء مرغوب فيه ومنتفع به أو عدم تعارفهم، ذلك ولا ريب أن هذا أمر يتجدد على مر العصور واختلاف الأمكنة، فكثير من الأشياء لم تكن له فى القديم فائدة فكان محقراً بين الناس... ثم تموله الناس وقابلوه بالأثمان، وكثيراً ما نرى الشيء في مكان تافهاً لا ينتفع به ولا قيمة له وفي مكان آخر من العزة والنفاسة بمقدار، ثم أن العرف العام والخاص في تعريف المالية سواء ولهذا قال البخاري في كشف الأسرار: وتثبت المالية بتمول الناس كافة أو بتمويله البعض، وهذا لأن

العرف المثبت للمالية من العرف الذي يرجع إليه في تطبيق الأحكام الكلية.
(العرف والعادة، للاستاذ احمد ابو سنة، ص: ١٨٠، ١٨١)

2. When a pre-emptor relinquishes his right of pre-emption (*shufʿah*), he cannot collect a return for it. The same rule ought to apply to *pagrī*.

It is incorrect to compare the issue of *pagrī* to the right of pre-emption. This is because there are two types of rights. Some are given to a person to save him from harm and loss. The right of pre-emption falls under this category. The Sharīʿah ruling for rights of this nature is that it is not permissible to collect a remuneration when relinquishing them. Other rights are given to a person as a way of benevolence and kinship. Remuneration for them can be collected. For example, khulaʿ in exchange for the right of marriage. The remuneration for *pagrī* falls under this category. (Further details in this regard will be given in the next question and answer – inshā Allāh).

3. Some scholars say that *khulūw/pagrī* is essentially bribery, and this is obviously unlawful.

If we think about it carefully, classifying it as bribery is questionable. Bribery refers to a payment which is not in exchange of a right. Whereas here, the amount for *pagrī* is collected in exchange for *khulūw*. Thus, it does not entail the collection of an amount without due right.

After a detailed discussion, ʿAllāmah Shāmī ra<u>h</u>imahullāh writes:

وهذا كلام وجيه لا يخفى على نبيه وبه اندفع ما ذكره بعض محشى الاشباه من أن المال الذي يأخذه النازل عن الوظيفة رشوة، وهي حرام بالنص، والعرف لا يعارض النص وجه الدفع ما علمت من أنه صلح عن حق كما في نظائره والرشوة لا تكون بحق. (فتاوى الشامى: ٥٢٠/٤، سعيد)

In this regard, there is a parallel practice of <u>H</u>a<u>d</u>rat <u>H</u>usayn ra<u>d</u>iyallāhu ʿanhu. He relinquished his lawful right to the caliphate in favour of <u>H</u>a<u>d</u>rat Muʿāwiyah ra<u>d</u>iyallāhu ʿanhu in exchange for an allocated stipend.

ʿAllāmah Shāmī ra<u>h</u>imahullāh writes:

واستدل بعضهم للجواز بنزول سيدنا الحسن بن سيدنا علي رضي الله تعالیٰ عنهما عن الخلافة لمعاوية رضي الله تعالیٰ عنہ علی عوض، وہو ظاہر أيضاً وہذا أولیٰ من عدم الجواز. (فتاوی الشامی: ٤/٥٢٠، سعيد)

In the light of the above quotations, it is not correct to refer to this practice as bribery.

Further reading: *Fatāwā Shāmī*, vol. 4 p. 519-520; *Huqūq Aur Oen Kī Kharīd Wa Faraukhat*, pp. 194-203.

4. Some scholars ask: Since the landlord has collected a once-off payment and it is in exchange for the right of occupation of the property and the right to benefit from it, for what is the monthly rental collected?

The owner of the shop can take back his shop at any time he wants on the basis of being its owner. However, by collecting a once-off payment, the right to take back the shop is relinquished either perpetually or temporarily. Since the land and shop belong to him, he collects a rent for enabling the tenant to derive benefit from his [landlord's] property. There is nothing objectionable in this regard.

Jadīd Fiqhī Masā'il:

If a house or shop is given on rent, and the owner of the property collects the customary *pagrī* in addition to the monthly rental, it will be understood that the landlord – on the basis of being the owner of the property – has collected a remuneration to relinquish his right to take his property away from the tenant. This amount will be permissible for him on the basis that it is in exchange for that right. Later on, if the landlord wants to take the property back from the tenant, the latter will have the right to ask for a mutually-agreed-upon amount from the landlord. In such a case, the tenant can relinquish his right by collecting an agreed-upon amount from the next tenant.[1]

Allāh taʿālā knows best.

The sale of a right to choice

Question

Is the sale and purchase of a right to choice permissible? What is the difference between a *haqq mutaqarrar* and *ghayr mutaqarrar*?

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[1] *Jadīd Fiqhī Masā'il*, vol. 4, p. 153.

<u>Answer</u>

The sale and purchase of a right to choice is impermissible.

قال فی الهداية: إن الخيار ليس إلا مشيئة وإرادة لا يتصور انتقاله. (الهداية: ٣٢/٣)

قوله لا يجوز الاعتياض عن الحقوق المجردة عن الملك قال فی البدائع الحقوق المجردة لا يحتمل التمليك ولا يجوز الصلح عنها... قوله كحق الشفعة ...ولو صالح المخيرة بمال لتختاره بطل ولا شيء لها. (رد المحتار: ٥١٨/٤، سعيد)

The jurists explain the difference between a *haqq mutaqarrar* and *ghayr mutaqarrar* as follows: A recompense can be taken for a *haqq mutaqarrar* but not for a *haqq ghayr mutaqarrar*. If a woman has acquired the right to implement a divorce on herself, and she takes a recompense for it, she will remain a wife as she had been. This is known as a *haqq ghayr mutaqarrar* – that after taking a recompense, the previous condition does not change. Recompense can be taken for the right of retribution (*haqq qisās*) because retribution is a *haqq mutaqarrar*. Before taking the recompense, the life of the killer was lawful. After accepting the recompense, his life becomes sacrosanct.

Another meaning of *haqq mutaqarrar* is *haqq al-mālik fī milkihi* (the right of the owner as regards what he owns). The right of choice is not applicable over one's belongings. The following is stated in *al-Hidāyah*:

لأن حق الشفعة ليس بحق متقرر فی المحل بل هو مجرد حق التملك فلا يصح الاعتياض عنه. (الهداية: ٤٠٦/٤، باب ما تبطل به الشفعة)

Aʿzamī Sāhib writes in the marginalia of *al-Hidāyah*:

ليس بحق متقرر كحق الاصطياد فی الصيد والحق المتقرر كالملك فی المملوك. (حاشية الهداية: ٤٠٦/٤، رقم الحاشية، ٦)

ʿAllāmah Akmal ad-Dīn Bābartī rahimahullāh, the author of *al-ʿInāyah* writes:

والفاصل بين الحق المتقرر وغيره أن ما يتغير بالصلح عما قبله فهو متقرر وغيره غير متقرر واعتبر ذلك فی الشفعة والقصاص، فإن نفس القاتل كانت

مباحة في حق من له القصاص، وبالصلح حصل له العصمة في دمه فكان حقاً متقرراً وأما فى الشفعة فإن المشتري يملك الدار قبل الصلح وبعده على وجه واحد فلم يكن حقاً متقرراً. (شرح العناية بهامش فتح القدير: ٤١٦/٩، ما يبطل به الشفعة، دار الفكر)

<u>شرح المجلة للاتاسى:</u>

عدم جواز الاعتياض عن الحقوق المجردة ليس على إطلاقه، بل فيه التفصيل: وهو أن ذلك الحق المجرد إن كان الشرع جعله لصاحبه لأجل رفع الضرر عنه، كحق الشفعة، وحق القسم للزوجة، وحق الخيار للمخيرة، فالاعتياض عنه بمال لا يجوز، لأن حق الشفعة للشفيع، وحق القسم للزوجة، وكذا حق الخيار فى النكاح للمخيرة، إنما ثبت لدفع الضرر عن الشفيع والمرأة، وما ثبت لذلك لا يصح الصلح عنه، لأن صاحب الحق لما رضي علم أنه لا يتضرر بذلك، فلا يستحق شيئاً وإن كان ذلك الحق قد ثبت لصاحبه أصالةً لا على وجه رفع الضرر كالوظيفة في وقف من إمامة وخطابة وأذان وفراشة وبوابة، فإن صاحبها قد ثبت له هذا الحق بتقرير القاضي على وجه الأصالة، لا لأجل رفع ضرر عن صاحبه، فينبغي أن يصح الاعتياض عن تلك الوظيفة بمال يأخذه الفارغ، وهو صاحب الوظيفة، من المفروغ له، لأنه صلح عن حق إلحاقاً له بالاعتياض عن القصاص بمال، وبالاعتياض عن النكاح بمال، وما أشبه ذلك. (شرح المجلة للاتاسى: ١١٩/٢، ١٢٠)

Further reading:

Radd al-Muhtār, vol. 4, pp. 518-520; *Hāshiyah at-Tahtāwī*, vol. 3, p. 9; *ʿItr Hidāyah*, p. 332; *Fiqhī Maqālāt*, vol. 1, p. 163; *Jadīd Fiqhī Masā'il*, vol. 4, p. 176; *Jadīd Fiqhī Mabāhith*, vol. 3, p. 147.

Allāh taʿālā knows best.

Royalties for copyrighted material

Question

Is it permissible to receive royalties for copyrighted material? Generally, there are three ways in which this is done:

1. A publisher or printer initiates a project and obtains the services of scholars for it. A remuneration is agreed upon for the task of writing, compiling, arranging, researching or other academic tasks. This system is by and large common among international publishing houses and printers.

2. An author gives the right to publish to a publisher. They make an agreement that for each new edition of the book, the publisher will pay a certain amount to the author. This is known as a royalty.

3. An author sells an eternal right to publish, and receives a large sum of money in return. In this way, all the rights of printing and publishing are held by the publisher.

In all the above cases, the publisher is legally and morally bound not to make any alterations, changes, additions and subtractions to the original book.

Which of the above is permissible according to the Sharīʿah?

Answer

It is permissible to receive royalties for copyrighted material. From the above three cases, there is no doubt whatsoever about the permissibility of the first one. The ruling for it is the same as for accepting the post of imāmat [in a masjid] or teaching. The book which is produced will belong to the printer or publisher because it paid for the work to be done.

As regards the second two, scholars of the past voiced differing opinions. In the beginning, most of them said that it was impermissible. In our times, the majority of the ʿulamāʾ are inclined towards permissibility. Generally, copyrighting or exerting one's rights over written material is accepted as a right of the author for the following reasons:

1. Current societal norms treat copyrights as commodities. Their sale and purchase are highly common. The practices of people play a major role in classifying something as wealth or a commodity. Details in this regard were given previously.

2. The jurists have permitted the acceptance of payment for teaching the Qur'ān, Hadīth, fiqh, etc. The reasoning which they give for permissibility is found here as well. For example, if teachers were not paid, the system of teaching and educating will be affected. In the same way, if an author is not given this right despite so many efforts and difficulties in producing a written work, he will become de-motivated. An author spends considerable time and mental energies when producing a written work. Furthermore, the task of preserving Dīn, propagating it and researching it can be affected. This reasoning cannot be disregarded.

3. This is a *haqq asbaqīyyat* (right of precedence) which is accepted by the Sharī'ah. Observe the following narration of *Sunan Abī Dāwūd*:

من سبق إلى ما لم يسبقه إليه مسلم فهو له. (رواه البيهقى فى سننه الكبرى: ١٤٢/٦، كتاب احياء الموات. وابو داود: ٤٣٧/٢، باب فى اقطاع الارضين)

4. To classify something as a commodity, it is necessary for it to be protect-able. The rights of an author are protected through legal registration.

5. Another prerequisite to classify something as a commodity is that it must be possible to derive benefit from it. Immense benefit can be derived from this right.

6. In addition to the need for many efforts in securing legal rights, large amounts of money have to be spent. It can therefore be made into a means of income.

Further reading: *Huqūq Aur Oen Kī Kharīd Wa Faraukhat*, pp. 208-215; *Jadīd Fiqhī Masā'il*, vol. 4, pp. 178-184; *Fiqhī Maqālāt*, vol. 1, pp. 223-227; *'Itr Hidāyah*, pp. 343-344; *Jadīd Fiqhī Mabāhith*, vol. 3.

Allāh ta'ālā knows best.

Royalties for each new edition

Question

An author gave his book to a printer to print. He laid down the condition that after the book is printed, he will receive 250 copies. The remainder belongs to the printer. He may sell them at whatever price he wants. Is this agreement permissible?

Answer

If the author gave perpetual rights of printing to the printer, then the 250 copies will be the value of the manuscript. The printer has

acquired perpetual rights for printing. But if he gave the right for one time, the 250 copies are the price of a single right to print. The right to print is one of the rights for which a person can ask for a remuneration. Details in this regard were given previously.

If the author did not mention the number of times – whether once or perpetually – societal norms will be taken into consideration. As far as I know, the right is given for a single edition of printing. This is why the author has the right to have his book printed somewhere else. If he has the book re-printed at the same printer, he can make a new agreement and take a certain number of copies as per the new agreement.

Allāh taʿālā knows best.

The sale of a trading licence and pension

Question

Is it permissible to sell a trading licence, pension, etc.?

Answer

1. A trader or company obtains a licence from the government to facilitate its business. Through this licence, the business is protected against governmental obstacles in the import and export of goods. However, a licence is not a tangible item. Rather, it is a right which enables a business to sell goods in another city or market, to transport them, or to purchase them from other countries or cities. A considerable amount of effort and monetary cost is borne for acquiring this licence. Based on the following reasons, the sale and purchase of a licence is permissible.

a) Its sale and purchase must be legally permissible. If it is not legally permissible, it will not be permissible according to the Sharīʿah. For example, the licence is in favour of a specific person or company, and the law does not permit it to be transferred to another company, then the sale of this licence will not be permissible.

b) The practice of its sale is common in the market. The traders – in their environment – treat a trading licence as they do any other commodity. It will therefore fall under the ruling of a commodity.

c) Benefit can be derived from it. The Sharīʿah does not prohibit deriving benefit from it.

d) The right is an intrinsic right in favour of the one who has it. It is not for the sake of repulsing a harm. Also, it must be present.

e) It must be storable. A trading licence is protected legally through a written certificate or registration.

Further reading: *Fiqhī Maqālāt*, vol. 1, p. 222; *Jadīd Fiqhī Masā'il*, vol. 4, p. 188; *Huqūq Aur Oen Ke Kharīd Wa Faraukhat*, p. 193; *Īdāh al-Anwār*, vol. 1, p. 43, *Na'ei Masā'il Aur 'Ulamā'-e-Hind Ke Fayslei*, p. 105.

The sale of a pension

A pension can be sold in two ways:

1. A person sells it to the government. In reality, this is not a sale but bringing forward a deferred contribution. If the government agrees to it, it will be permissible according to the Sharī'ah.

2. It is not permissible to sell it to anyone other than the government. Firstly because the government itself does not approve of it. Secondly, it has certain disadvantages. For example, it is not permissible to sell the currency of one country for the currency of the same country on credit.

Ahsan al-Fatāwā:

A pension is a type of gift. An employee is not its owner until he takes possession of it. This is why it cannot be sold. However, selling it to the government is not a sale in reality. It is a sale only in name. What it really means is that the large amount [gift] which the government had promised to give in instalments is now given at once, but for a lower amount. This transaction is permissible with the government.[1]

Imdād al-Fatāwā:

The government re-purchases it...this is a sale only in name. In reality, it is a complete donation from the government. This is why it is permissible through the approval of the government.[2]

Further reading: *Āp Ke Masā'il Aur Oen Kā Hull*, vol. 6, p. 53; *Islām Aur Jadīd Ma'āshī Masā'il*, vol. 4, p. 168; *Fatāwā Haqqānīyyah*, vol. 6, p. 39.

Allāh ta'ālā knows best.

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[1] *Ahsan al-Fatāwā*, vol. 6, p. 521.

[2] *Imdād al-Fatāwā*, vol. 4, p. 580.

The difference between haqq mutaqarrar and ghayr mutaqarrar

Question

What details do the jurists have with respect to rights. What is the difference between haqq mutaqarrar and ghayr mutaqarrar? Which are the rights for which a remuneration can be accepted and which cannot be accepted? For example, what is the ruling with regard to *pagrī*?

Answer

The 'ulamā' have many discussions and differences on this issue. Nonetheless, it has become common practice to accept a remuneration for rights.

The jurists have divided rights into two categories: (1) huqūq mutaqarrarah and (2) huqūq mujarradah.

1. Haqq mutaqarrar: This refers to a right which changes after an agreement is reached, and its ruling changes.
2. Haqq mujarrad: This refers to a right which does not change after an agreement is reached. It remains as it was. No type of change whatsoever takes place.

An example of haqq mutaqarrar: Qisās (retribution). Before an agreement is reached, the killer's life was lawful. After an agreement is reached, his life becomes sacrosanct. It is permissible to accept a remuneration or to effect a reconciliation in rights of this nature.

The right of *pagrī* also seems to fall under this category. Before accepting a remuneration, the owner had the right of occupation over a property. After accepting a payment and reaching an agreement, the buyer now enjoys these rights. As though the buyer has acquired perpetual benefit.

An example of haqq mujarrad: The right of pre-emption (shuf'ah) or where a husband first gives his wife the right to implement a divorce, and later on says to her: "Choose me in return for one thousand." Both these are huqūq mujarradah, and no monetary benefit is attached.

The right of shuf'ah is a haqq mujarrad because before the agreement, the land belonged to the buyer; and after the agreement, it still belongs to him. Also, where the wife was given the right to divorce – she was his wife before the agreement, and remains his wife after the agreement. In this case, the previous condition or situation has not changed. This is why it is a haqq mujarrad, and it is not permissible to collect a payment for it.

الهداية:

وإن صالح من شفعته على عوض بطلت شفعته ورد العوض، لأن حق الشفعة ليس بحق متقرر فى المحل، بل هو مجرد حق التملک، فلا يصح الاعتياض عنه،... بخلاف القصاص لأنه حق متقرر. (الهداية: ٤٠٦/٤)

شرح العناية:

والفاصل بين المتقرر وغيره أن ما يتغير بالصلح عما كان قبله فهو متقرر، وغيره غير متقرر، واعتبر ذلک فی الشفعة والقصاص، فإن نفس القاتل كانت مباحة في حق من له القصاص، وبالصلح حصل له العصمة في دمه، فكان حقاً متقرراً، وأما فی الشفعة فإن المشتري يملک الدار قبل الصلح وبعده على وجه واحد، فلم يكن حقاً متقرراً. (شرح العناية بهامش تكملة فتح القدير: ٤١٦/٩، ما يبطل به الشفعة، ط: دار الفكر)

Other examples can be given under the above principles. Where it is permissible for a person to accept a remuneration for a right or to reach an agreement for it, and it is a haqq mutaqarrar. For example, the jurists say that a remuneration can be accepted for nuzūl ʻan al-wazā'if. In other words, an employee can vacate his post and appoint someone else in his place; and he takes a payment for doing this. This is also a haqq mutaqarrar because before the agreement, a particular person was at that post, and after the agreement, another person took over that post.

وعليه فيفتى بجواز النزول عن الوظائف بمال. وفى الشامية: قال العلامة العيني في فتاواه: ليس للنزول شيء يعتمد عليه، و لكن العلماء والحكام مشوا ذلک للضرورة، واشترطوا إمضاء الناظر، لئلا يقع فيه نزاع، ملخصاً من حاشية الأشباه للسيد أبي السعود. (الدر المختار مع فتاوى الشامی: ٥١٩/٤، سعيد)

وللاستزادة انظر: (فتاوى الشامى: ٥٢٤/٤، سعيد. والاشباه والنظائر مع الحموى: ٢٩١/١. ومنحة الخالق على البحر الرائق: ٢٣٤/٥، ٢٣٥، كوئته)

Some jurists consider it permissible to collect a payment for the right to irrigate a land – known as haqq ash-shurb. This is because previously the person did not have the right to take the water because it is a specific water. He now acquired the right to irrigate his land.

بخلاف الشرب حيث يجوز بيعه تبعاً باتفاق الروايات، ومفرداً في رواية وهو اختيار مشايخ بلخ، لأنه حظ من الماء. (الهداية: ٥٦/٣)

'Allāmah Sarakhsī rahimahullāh writes in his *al-Mabsūt*:

وكان شيخنا الإمام يحكي عن أستاذه أنه كان يفتي بجواز بيع الشرب بدون الأرض، ويقول: فيه عرف ظاهر في ديارنا بنسف، فإنهم يبيعون الماء، فللعرف الظاهر كان يفتي بجوازه. (المبسوط: ١٣٥/١٤، دار الفكر)

'Allāmah Sarakhsī rahimahullāh states that no consideration is given to societal norms in this case because they are against explicit texts [Qur'ān and Hadīth]. However, later on, he himself explains the issue in more detail in Kitāb al-Muzāra'ah where he quotes the view of latter day scholars on the permissibility of bay' ash-shurb on the basis of societal norms. He does not condemn this view. He writes:

وبعض المتأخرين من مشايخنا أفتى أن يبيع الشرب وإن لم يكن له أرض للعادة الظاهرة فيه في بعض البلدان، وهذه عادة معروفة بنسف، قالوا : إنما جوز الاستصناع للتعامل، وإن كان القياس يأباه، فكذلك بيع الشرب بدون الأرضي الله عنه. (المبسوط للامام السرخسى: ١٧١/٢٣)

وفى الفتاوى السراجية: بيع الشرب تبعاً للأرض جائز، ومقصوداً كذلك في رواية وبه أخذ مشايخ بلخ. (الفتاوى السراجية: ٣٧٢، كتاب البيوع، ما يجوز بيعه وما لا يجوز)

Furthermore, he says that it is permissible to collect payment for haqq al-murūr (the right of passage) because it is also like a haqq

mutaqarrar in the sense that previously the person did not have the right to travel on a particular road, and now he got the right.

The following is stated in *al-Hidāyah*:

أما حق المرور يتعلق بعين تبقى، وهو الأرض فأشبه الأعيان.

The permission to sell h̲aqq al-murūr is related by Ibn Samāʿah:

قال فى العناية: وبيع حق المرور، وهو حق التطرق دون رقبة الأرض جائز في رواية ابن سماعة. (العناية فى شرح الهداية بهامش فتح القدير: ٤٢٩/٦، دار الفكر. وكذا فى الفتاوى الهندية: ١٣١/٣-و ٢٩٤/٦. وتبيين الحقائق: ٥٢/٤، ملتان)

<u>الدر المختار:</u>

وصح بيع حق المرور تبعاً للأرض بلا خلاف، ومقصوداً وحده في رواية، وبه أخذ عامة المشايخ. وفى الشامية: قوله وبه أخذ عامة المشايخ، قال السائحاني: وهو الصحيح، وعليه الفتوىٰ، مضمرات، انتهىٰ. (الدر المختار مع فتاوى الشامى: ٨٠/٥،سعيد)

Similarly, in khulaʿ, a woman makes a payment to obtain a release from her marriage. This payment is not in exchange for a specific item or thing. It is paid to obtain her release.

In marriage, the dowry is paid to acquire the right of marriage.

In *Sharh̲ al-Majallah*, it is stated that it is permissible to accept a remuneration – to keep the peace – for h̲aqq ʿulūw and other h̲uqūq mujarradah.

قال الأتاسى في شرح المجلة: وعلى ما ذكره من جواز الاعتياض عن الحقوق المجردة بمال، ينبغي أن يجوز الاعتياض عن حق التعلى، وعن حق الشرب، وعن حق المسيل بمال، لأن هذه الحقوق لم تثبت لأصحابها لأجل دفع الضرر عنهم، بل تثبت لهم ابتداءً بحق شرعي، فصاحب العلو إذا انهدم علوه، قالوا: إن له حق إعادته كما كان جبراً عن صاحب السفل، فإذا نزل عنه لغيره بمال

معلوم ينبغي أن يجوز ذلک علی وجہ الفراغ والصلح، لا علی وجہ البیع، کما جاز النزول عن الوظائف ونحوہا لا سیما إذا کان صاحب حق العلو فقیراً قد عجز عن إعادۃ علوہ، فلو لم یجز ذلک لہ علی الوجہ الذي ذکرناہ، یتضرر فلیتأمل، ولیحرر، واللہ سبحانہ أعلم. (شرح المجلة للاتاسی: ۱۲۱/۲)

To summarize the above: Accepting a payment for haqq-e-mutaqarrar is mentioned in *al-Hidāyah* and the commentary to it. As for a haqq mujarrad, e.g. haqq taʿallī, if there is a practice of accepting a payment for it, then it is permissible as per *Sharh al-Majallah.*

Fatāwā Haqqānīyyah:

Although a copyright is related to huqūq mujarradah, one has to bear in mind that there are two types of huqūq mujarradah:

1. Rights which have monetary gains attached to them, e.g. haqq wazīfah.
2. Rights which do not have monetary gains attached to them, e.g. haqq shufʿah.

The Sharīʿah permits the acceptance of money/wealth in exchange for forfeiting one's right which has a monetary gain attached to it. Since monetary benefit is attached to a copyright, its sale and purchase is permissible. It is referred to as haqq asbaqīyyat in juridical terminology.[1]

The same is mentioned in *Nizām al-Fatāwā*, vol. 2, p. 316.

We say: Monetary benefit is also attached to a house and shop. It is therefore permissible to accept a payment in exchange for their rights.

فإنهم قالوا: یجوز أخذ العوض علی وجہ الإسقاط للحق. (فتاوی الشامی: ٥٢٠/٤، سعید)

In the above-mentioned case, the owner forfeited his right of occupation and accepted a remuneration in exchange for it. It ought to be permissible.

[1] *Fatāwā Haqqānīyyah*, vol. 6, p. 111.

وحاصله: أن ثبوت حق الشفعة للشفيع وحق القسم للزوجة، وكذا حق الخيار فى النكاح للمخيرة، إنما هو لدفع الضرر عن الشفيع والمرأة، وما ثبت لذلک لا يصح الصلح عنه، لأن صاحب الحق لما رضي علم أنه لا يتضرر بذلک، فلا يستحق شيئاً، أما حق الموصىٰ له بالخدمة فليس كذلک، بل ثبت له على وجه البر والصلة فيكون ثابتاً له أصالة، فيصح الصلح عنه إذا نزل عنه لغيره، ومثله ما مر عن الأشباه من حق القصاص والنكاح والرق حيث صح الاعتياض عنه، لأنه ثابت لصاحبه أصالة لا على وجه دفع الضرر عن صاحبه... الخ. (فتاوى الشامى: ٥٢٠/٤، سعيد)

الهداية:

ومن ادعى على الآخر مالاً فافتدى يمينه أو صالحه منها على عشرة دراهم فهو جائز. (الهداية: ٢٠٩/٣)

A person made a claim against another. The litigant made peace with the claimant and paid him some money. This is permissible. Here too, a remuneration was accepted in return for a haqq yamīn. And this is permissible.

Further reading: *Huqūq Mujarradah Kī Kharīd Wa Faraukhat* by Muftī Muhammad Taqī ʿUthmānī Sāhib; *al-Madkhal al-Fiqhī al-ʿĀm*, vol. 3 by Shaykh Mustafā az-Zarqā; *Sharh al-Majallah*; *al-Mausūʿah al-Fiqhīyyah al-Kuwaytīyyah*; *Jadīd Fiqhī Mabāhith*, vol. 3; *al-Fiqh al-Islāmī Wa Adillatuhu*, vol. 4.

Allāh taʿālā knows best.

A permanent lease

Question

A piece of land has been leased perpetually. Will this right be transferred to the heirs? In our province – Gujarat, India – tracts of land are leased from the government. A formal permanent lease agreement is signed. In this agreement, the government agrees to give a piece of land to a tenant on permanent rent. The revenue records contain the details of the person as a tenant. The government remains the owner of the land, and is accepted as such. The tenant is given the

right to exercise full control over the land. For example, he could rent it to someone else, construct a building on the land and give it out on rent, etc. However, the tenant cannot sell the land to anyone. In other words, a sale agreement of the land cannot be registered in any office.

The government never takes the land back, nor does it stop the tenant from doing whatever he wants with it for as long as he is under that agreement. An annual rental is specified by the government, and this has to be paid by the tenant.

My question is: Does this land belong to the government or is the tenant considered to be its owner? When the tenant passes away, will all his heirs have a claim over it or only that person whom the government chooses?

<u>Answer</u>

A permanent lease enables a tenant to enjoy this right perpetually. Therefore, when he passes away, this right will be transferred to his heirs. However, since there is no ownership of the property, it will not be permissible to sell it. Ownership will remain in the hands of the original owner. The heirs too will only have the right to use it, give it out on rent or loan it out. This latter right will not be transferred to them as a transfer of ownership. Furthermore, this right will be transferred to all the Sharʿī heirs. ʿAllāmah Shāmī ra<u>h</u>imahullāh rights with reference to *pagrī*:

نعم يفتى به فيما دعت إليه الحاجة وجرت به فى المدة المديدة العادة وتعارفه الأعيان بلا نكير كالخلو المتعارف فى الحوانيت ...قلت: ورأيت في فتاوى الكازرونى عن العلامة اللقاني أنه لو مات صاحب الخلو يوفى منه ديونه ويورث عنه وينتقل لبيت المال عند فقد الوارث. (فتاوى الشامى: ٥٢١/٤، مطلب فى خلو الحوانيت، سعيد)

In the Sharīʿah there are certain rights which are inherited and distributed among all the heirs as per the shares which the Sharīʿah has allocated to them. For example, the right of qi<u>s</u>ā<u>s</u> (retribution) and diyat (blood money) is transferred to all the heirs. ʿAllāmah Sarakhsī ra<u>h</u>imahullāh writes:

ولأن القصاص حق الميت بدليل أنه لو عفا عن الجارح صح وانقلب مالاً تقضى منه ديونه وتنفذ وصاياه ويورث عنه. (المبسوط للامام السرخسى: ١٧٨/٢٦)

The right of rental is also from among those rights in which the laws of inheritance will apply, and be distributed among all the heirs. The author of *al-Hidāyah* states:

وأصل هذا أن القصاص حق جميع الورثة وكذا الدية... ولنا أنه عليه الصلاة والسلام أمر بتوريث امرأة أشيم الضبابى من عقل زوجها أشيم ولأنه حق يجرى فيه الإرث. (الهداية: ٥٧٢/٤، باب القصاص فيما دون النفس)

ʻAllāmah Zaylaʻī ra<u>h</u>imahullāh clarifies this further:

ولنا قوله عليه الصلاة والسلام: من ترك مالاً أو حقاً فلورثته ومن ترك كلاً فعلي والقصاص حقه فيكون لجميعهم كالمال وأمر عليه الصلاة والسلام بتوريث امرأة أشيم الضبابى من دية زوجها أشيم ولأن القصاص حق يجرى فيه الإرث حتى أن من قتل وله ابنان فمات أحدهما عن ابن كان القصاص بين الصلبى وبين ابن الابن فثبت لسائر الورثة والزوجية تبقى بعد الموت حكماً فى حق الإرث... وكان علي رضي الله عنه يقسم الدية على من أحرز الميراث والدية حكمها حكم سائر الأموال.

وبهامشه قوله: والورثة كلهم فى ذلک سواء، قال الإتقانى: والأصل في ذلک أن القصاص يستحقه من يستحق ماله على فرائض الله تعالىٰ الذكر والأنثى فى ذلک سواء والزوج والزوجة فى ذلک سواء نص عليه الكرخى فى مختصره. (تبيين الحقائق مع الحاشية: ٦/ ١١٤، ط: امداديه، ملتان)

It becomes clear from the above quotations that qi<u>s</u>ā<u>s</u> and diyat are rights which are transferred to the heirs, and that all heirs are partners in them. Observe the following with reference to the right of wa<u>s</u>īyyat and the right of shufʻah:

قال فى الهداية: وإن مات المشتري لم تبطل أى الشفعة لأن المستحق باق ولم يتغير سبب حقه. (الهداية: ٤/٣٢١)

This means that if a buyer bought a land and he passes away, the right of shufʿah will be transferred to his heirs.

The author of *al-Hidāyah* writes with reference to the right of wasīyyat:

قال: إلا فى مسئلة واحدة وہى أن يموت الموصى ثم يموت الموصى له قبل القبول فيدخل الموصى به فى ملک ورثته استحساناً. (الهداية: ٤/٥١٥)

In other words, if Zayd makes a bequest of one third of his estate in favour of ʿAmr, and ʿAmr passes away after the demise of Zayd, the right of the bequest will be transferred to the heirs of ʿAmr.

Hadrat Maulānā Qādī Mujāhidul Islām Sāhib rahimahullāh writes with reference to *pagrī*:

If the silent approval of societal norms was put into words, it would mean that when a landlord collects *pagrī* from a tenant at the time of renting a property to him, it means that while he has maintained his ownership right, he has sold the right of occupation. This right of the tenant cannot be seized by the landlord. It will also be transferred to the tenant's heirs.[1]

Jadīd Maʿāshī Nizām:

In a permanent lease agreement, the tenant receives a permanent right of leasing a property. After he passes away, the right is transferred to his heirs, but not ownership. Ownership of the property remains with the original owner. The tenant receives the right to use the property. When he passes away, the same right is transferred to his heirs. This is because in a permanent lease agreement, there is no ownership; only a right.[2]

It becomes crystal clear from the above quoted texts that a permanent lease agreement is a permanent right which will be transferred to the heirs, as is the case with other rights. Ownership will remain with the original owner. Nonetheless, the right to rent or occupy the property will be transferred. Also, it will be transferred to all the heirs; there is no stipulation for sons alone.

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[1] *Majallah Fiqh Islāmī*, vol. 1, p. 83, Islamic Fiqh Academy, India.

[2] *Jadīd Maʿāshī Nizām*, p. 393.

There is a text of ʿAllāmah Shāmī rahimahullāh (in *Majmūʿah Rasā'il Ibn ʿĀbidīn*, vol. 2, p. 152), and a statement of Muftī Muhammad Shafīʿ Sāhib rahimahullāh (in *Jawāhir al-Fiqh*, vol. 5, p. 20) which show that the right of permanent occupation rests with the sons only. In the absence of son/s, the daughter/s will receive that right. We are of the view that this view is surpassed on account of the previously-quoted texts. Other jurists and ʿAllāmah Shāmī rahimahullāh himself (as quoted previously) consider it to be an inheritance, and everyone [sons and daughters] have a right in it.

Nowadays, a permanent right is considered to be a valuable asset. To give it to one heir and deprive the others is most certainly against the spirit of the Sharīʿah.

Allāh taʿālā knows best.

CURRENCY TRANSACTIONS

Exchanging one currency for the same currency

Question

What is the ruling with regard to changing an old currency with a new one with a difference in the amount? Some muftīs say that it is impermissible because it entails bayʿ bi al-fils bi al-filsayn, and irrespective of the monetary price, it is a valuable metal. On the other hand, paper money – without a monetary price – has no value; it is a useless item. Therefore, it is not correct to apply the rules of coins to paper money. What is the ruling of your Dār al-Iftā in this regard?

Answer

The fundamental and natural currency of the Sharīʿah is dirhams and dīnārs. The currencies which are in vogue today are thaman-e-ʿurfī (an accepted currency); not thaman-e-khalqī (a natural currency). This is why all the rules of a natural currency will not apply to it. After all, there is a major difference between the two. The value of a natural currency is perpetual, while the value of a thaman-e-ʿurfī exists for as long as a government classifies it as such. If it announces the cancellation of its currency, its value will cease to exist. Nonetheless, if modern-day currencies are exchanged – one for another – then there ought to be room for its permissibility.

إن الأموال ثلاثة: ثمن بكل حال وهو النقدان، صحبه الباء أولا،... وثمن بالاصطلاح وهو سلعة فى الأصل كالفلوس فإن كانت رائجة فهي ثمن وإلا فسلعة. (البحر الرائق: ٢٠٣/٦، كتاب الصرف، كوئته. وكذا فى تبيين الحقائق: ٩٠/٤، ملتان. والمحيط البرهانى: ١٧١/٧)

If a modern-day currency is exchanged with a difference in the amount, this exchange could take three forms:

1. It is unspecified by both parties. Neither of the parties specified it. This exchange is unanimously classified as unlawful and harām on the basis of bayʿ al-kālī bi al-kālī.
2. One party specifies it while the other does not. If the unspecified currency is deferred, the exchange is unanimously classified as unlawful. If the unspecified currency is not deferred, but possession of it is not taken on the spot, there

are differences of opinion on its permissibility. Some ʿulamā' say it is permissible while others sat it is not.

3. The currencies are specified by both parties. The ʿulamā' differ in this regard. Imām Abū Hanīfah and Imām Abū Yūsuf rahimahumallāh are of the view that it is permissible while Imām Muhammad rahimahullāh says it is not. This is because Imām Muhammad rahimahullāh does not believe in any difference between a thaman-e-khalqī and thaman-e-ʿurfī.

وإذا باع فلساً بفلسين حالة الرواج، فهذه المسألة على ثلاثة أوجه: أحدها: أن يبيع فلساً بغير عينه بفلسين بغير أعيانهما وفي هذا الوجه، البيع فاسد لوجهين: أحدهما أن هذا بيع الدين بالدين. والثاني: أن الجنس بانفراده محرم للنساء عندنا.

الوجه الثاني: إذا باع فلساً بعينه بفلسين بأعيانهما وفي هذ الوجه البيع جائز في قول أبي حنيفة وأبي يوسف، وقال محمد: لا يجوز.

والوجه الثالث: إذا كان أحد البدلين عيناً والآخر ديناً وفي هذا الوجه إن كان ما في الذمة مؤجلاً لا يجوز البيع لما ذكرنا أن الجنس بانفراده يحرم النساء عندنا، وإن كان ما في الذمة غير مؤجل لا شك أن على قول محمد لا يجوز، لأن عنده لو باع فلساً بعينه بفلسين بأعيانهما لا يجوز فإذا كان أحد البدلين بغير عينه أولى.

وأما على قول أبي حنيفة وأبي يوسف: فقد اختلف المشايخ، بعضهم قالوا: يجوز، لأن الفلوس عندهما تصير بمنزلة العرض حال مقابلته لجنسه، قالوا: لو باع فلساً بعينه، بفلسين بأعيانهما يجوز فإذا صار الفلس المعين على مذهبهما بمنزلة العرض كان بمنزلة ما لو باع عرضاً بعينه بفلسين في الذمة. ومنهم من قال: لا يجوز، لأن الفلس عندهما إنما تتعين بالتعيين حال تعيين أحد البدلين، فلا يجوز، وهذا لأن الفلوس الرائجة لها حكم العرض من وجه. (المحيط البرهاني: ٢٧٠/٧)

وفى البحر: وليس مرادهم خصوص بيع الفلس بالفلسين بل بيان حل التفاضل حتى لو باع فلساً بمائة على التعيين جاز عندهما. (البحر الرائق: ١٣٢/٦، باب الربا، كوئٹہ)

وفى الفتاوى الهندية: ولو باع فلساً بعينہ بفلسين بغير أعيانهما أو على العكس لا يجوز ما لم يقبض ما كان ديناً فى المجلس. (الفتاوى الهندية: ١٠٣/٣)

وفى البحر: لو قبض ما كان ديناً فى المجلس جاز. (البحر الرائق: ١٣١/٦، كوئٹہ)

وفي فتح القدير: وأصلہ (الخلاف مبني على) أن الفلس لا يتعين بالتعيين ما دام رائجاً عند محمد وعندهما يتعين. (فتح القدير: ٢١/٧، دار الفكر)

The author of *al-Hidāyah*, Ibn Humām and ʽAllāmah Abū Bakr Kāsānī gave preference to the view of Imām Abū Hanīfah and Imām Muhammad rahimahumallāh. Shams al-A'immah Halwānī rahimahullāh said that the verdict is issued on their view.

فتح القدير:

وتأخير دليلهما بحسب عادة المصنف ظاهر في اختياره قولهما. (فتح القدير: ١٥٨/٧، كتاب الصرف، دار الفكر)

الفتاوى الهندية:

قال الشيخ الإمام الأجل شمس الأئمة الحلواني: كل جواب فى الفلوس فهو الجواب فى الدراهم البخارية أعني بها الغطارف، وكذلك الجواب فى الرصاص والستوق، قالوا: ويجب أن يكون فى العداليكذلک كذا فى الذخيرة، حتى لو باع واحداً منهما باثنين يجوز بعد أن يكون يداً بيدٍ، هذا هو المختار للفتوىٰ كذا فى الغياثية. (الفتاوى الهندية: ١٠٣/٣)

Another angle to the issue of permissibility

If we were to disregard the issue of monetary value and look at it from a different angle, we still do not see any reason for making it impermissible. When money is exchanged with differences in the amount – even if the currency is the same on both sides – there is no weight [of the currencies as in the case of gold and silver]. And for it to be classified as usury, it is necessary to have the weight with the genus. The reason for this is that money [cash notes] are included as items which are counted. And when counted items of the same genus are exchanged, it is permissible for there to be a difference in the number. This is on the condition that the items which are exchanged by both parties are present in the place of the transaction, and they are specified.

وإن قلنا: إن الثمنية لا تبطل إلا أن ربا النقد إنما يجري بالجنس والقدر وهو الكيل أو الوزن وههنا إن وجد الجنس لم يوجد القدر، أما الكيل فظاهر وأما الوزن، فلأن الناس تعارفوا بيع الفلوس عدداً لا وزناً ولهذا، قلنا: إذا باع فلساً بعينه وأحدهما أثقل من الآخر وزناً أنه يجوز، ولو كان موزوناً لكان لا يجوز كما إذا باع درهماً بدرهم أثقل من الآخر وزناً وههنا لما جاز علمنا أن الوزن ساقط الاعتبار فى الفلوس فلم يوجد إلا الجنس فلا يجرى الربا. (المحيط البرهانى: ٢٧٠/٧)

وفى البدائع: ويجوز بيع العدديات المتقاربة من غير المطعومات بجنسها متفاضلاً عند أبي حنيفة وأبي يوسف بعد أن يكون يداً بيدٍ كبيع الفلس بالفلسين بأعيانهما. (بدائع الصنائع: ١٨٥/٥، سعيد)

وفي فتح القدير: قوله ويجوز بيع البيضة بالبيضتين... إن ذلك كله مشروط بكونه يداً بيدٍ أو هي من مسائل الجامع الصغير، صورتها فيه: محمد عن يعقوب عن أبي حنيفة في بيع بيضة ببيضتين وجوزة بجوزتين وفلس بفلسين وتمرة بتمرتين يداً بيدٍ جاز إذا كان بعينه وليس كلاهما ولا أحدهما ديناً. (فتح القدير: ٢٠/٧، دار الفكر)

وفى العناية: بيع العددى المتقارب بجنسہ متفاضلاً جائز إن كانا موجودين لانعدام المعيار، وإن كان أحدہما نسيئة لا يجوز لأن الجنس بانفراده يحرم النساء. (شرح العناية على ہامش فتح القدير: ٢٠/٧، دار الفكر)

فتاوى الشامى:

ثم اعلم أن ذكر النساء للاحتراز عن التأجيل، لأن القبض فى المجلس لا يشترط إلا فى الصرف وہو بيع الأثمان بعضها ببعض أما ما عداه فإنما يشترط فيہ التعيين دون التقابض. (فتاوى الشامى: ١٧٢/٥، باب الربا، سعيد)

Some objections and answers to the above

1. Some muftīs say that it is not correct to compare currency notes with coins because even when the value of a coin becomes non-existent [as a currency], it is still of high monetary value. On the hand, a currency note becomes valueless when the currency is cancelled.

The answer to this is that paper money in itself is also something to which a tangible value could be attached. Without its monetary value, it can still be used for different purposes, e.g. burning it, beautification, making a necklace, reusing it by recycling it. In fact, sometimes an old note becomes more valuable because people store it as an investment or the government takes it back at a higher price.

Refer to *Jadīd Fiqhī Mabāhith*, vol. 2, p. 81 for further details.

The second answer to this is that when it comes to monetary value, a difference of this nature is not harmful. This is because the definition which the jurists give for *fulūs* (money) includes paper money; it is not specific to minted coins.

Shaykh Ahmad Zarqā writes in *Sharh al-Qawā'id al-Fiqhīyyah*:

والذي يظہر أن الورق النقدي الرائج في بلادنا الآن ونظيره الرائج فى البلاد الأخرى، ہو معتبر من الفلوس النافقة، وما قيل فيها من الأحكام السابقة، يقال فيہ لأن الفلوس النافقة ہي ما كان متخذاً من غير النقدين الذہب والفضة،... والورق المذكور من ہذا القبيل، ومن يدعي تخصيص الفلوس

النافقة بالمتخذ من المعادن فعليه البيان. (شرح القواعد الفقهية، للشيخ أحمد الزرقا، ص ١٧٤)

In fact, as per a statement of Imām Mālik rahimahullāh, *fulūs* is also made of leather.

لو أن الناس أجازوا بينهم الجلود حتى تكون لها سكة وعين لكرهتها أن تباع بالذهب والورق نظرة. (المدونة الكبرى: ٩٠/٣، التأخير في صرف الفلوس، دار الفكر)

وفى المصباح المنير: الفلس الذي يتعامل به. (المصباح المنير: ٤٨١/٢، بيروت)

Further reading: *Jadīd Fiqhī Mabāhith*, vol. 2, p. 133.

Although a currency note is a piece of paper, it falls under the category of *fulūs*. It can be exchanged with variations in the amount. This is clearly stated in *Fath al-Qadīr*:

لو باع كاغذة بألف يجوز ولا يكره. (فتح القدير: ٢١٢/٧، كتاب الكفالة، دار الفكر. وكذا فى رد المحتار: ٣٢٦/٥، سعيد)

Therefore, those who say that a currency note is valueless when its monetary value is removed are incorrect.

2. Some scholars prohibit it on the basis of the following statement of the author of *al-Hidāyah*:

ومشايخنا لم يفتوا بجواز ذلک فى العدالى والغطارفة لأنها أعز الأموال في ديارنا فلو أبيح التفاضل فيه ينفتح باب الربا. (الهداية: ١٠٩/٣)

The actual reason for the prohibition of *ʿadālā* and *ghatārifah* was that silver used to be present in it in those days. Since silver is a thaman-e-khalqī and that too, because the silver was on the surface, people used to treat it as silver. Mixing it with other valuable metals did not cause major differences in its value when compared to the value of silver.

أن الفضة وإن كان أقل فهي قائمة للحال حقيقة، فإنها ترى وتشاهد، فإن اللون لون الفضة ومتى أذيبت تخلص الفضة وتخرج بيضاً خالصةً... فكانت

الفضة قائمة باعتبار الحال والمآل... فلأن الفضة يجعل فى الصفر لترويج الصفر بالفضة ولهذا سموه دراہم، ولهذا جعلوا الفضة ظاہراً والصفر باطناً فكانت الفضة معتبرة وإن كان أقل من الصفر.(المحيط البرہانى: ٢٧٦/٧)

This is why the jurists included it in bayʿ as-sarf, and said that it is necessary for mutual possession to take place when it is exchanged.

ولكنہ مع ہذا صرف حتى يشترط القبض قبل الافتراق... لوجود الفضة من الجانبين. (فتح القدير: ١٥٢/٧، كتاب الصرف، دار الفكر)

Hadrat Maulānā Rashīd Ahmad Gangohī rahimahullāh also gives preference to the view of Imām Abū Hanīfah and Imām Abū Yūsuf rahimahumallāh. He says that it is permissible to exchange money with differences in the amount.

Fatāwā Rashīdīyyah:

We conclude that *fulūs* is a countable item. If it is exchanged for the like of it, it is permissible because the genus is the same. Since there is no weighing and measuring, differences in the amount are permissible but a deferred payment is harām. This is the verdict of Imām Abū Hanīfah and Imām Abū Yūsuf rahimahumallāh and it is the stronger view.[1]

Muftī Nizām ad-Dīn Aʿzamī rahimahullāh and Muftī Farīd Sāhib also state that it is permissible.[2]

Summary of above:

It is very rare to sell notes on the spot with differences in the amount. Occasionally, people exchange old notes for new ones on the occasion of ʿīd. Exchanging of notes is not practised in normal situations. As for the rupees or rands which are accumulated as interest from a bank, and then increase in number after a passage of time – this is usury and it is absolutely harām. This is known as Qur'ānic usury:

وَإِنْ تُبْتُمْ فَلَكُمْ رُءُوْسُ أَمْوَالِكُمْ. لَا تَظْلِمُوْنَ وَلَا تُظْلَمُوْنَ.

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[1] *Fatāwā Rashīdīyyah*, p. 537, Maktabah Rahmānīyyah.

[2] *Muntakhabāt Nizām al-Fatāwā*, vol. 2, p. 374; *Fatāwā Farīdīyyah*, vol. 2, p. 677.

> If you repent, then for you is your capital wealth. Neither should you wrong anyone nor should anyone wrong you.[1]

In short, increasing a loan amount because of an increase in the period of the loan is totally unlawful.

Some scholars such as Muftī Kifāyatullāh Sāhib rahimahullāh, Maulānā ʿAbd al-Hayy rahimahullāh, Muftī Taqī Sāhib and others are of the view that it is not permissible to sell currency notes when there are differences in the amount.

This view is based on caution. In the light of the above proofs, there ought to be room for permitting the sale of currency notes with differences in the amount.

The decision of the Islamic Fiqh Academy on the issue of exchanging currency notes:

Presently, transactions with currency notes have completely replaced the natural currencies – gold and silver. Mutual loans and credits are conducted through notes. This is why currency notes are similar to thaman-e-haqīqī (genuine monetary value) as regards the rules which apply to them. Therefore, exchanging the currency of one country with the currency of the same country with differences in the amount is impermissible; neither in a cash transaction nor in a credit transaction.

Allāh taʿālā knows best.

A bill of exchange

Question

Zayd bought goods to the value of R100 000 from ʿUmar. It was agreed that Zayd will pay the amount after two months. He gave ʿUmar a post-dated cheque which he will be able to cash only after two months. However, ʿUmar needs the money immediately, so he goes to Bakr or to a bank and sells the cheque or bill for R98 000. Bakr or the bank will receive the R100 000 after two months [as per the date on the cheque]. Is this transaction permissible?

Answer

This is an interest transaction because Bakr or the bank paid R98 000 and will collect R100 000 after two months. Yes, if there is an urgent

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[1] Sūrah al-Baqarah, 2: 279.

need, ʿUmar could sell goods to Bakr or the bank for R98 000 and collect R98 000 from it. The same buyer [Bakr or the bank] must take possession of the goods and then re-sell them to ʿUmar for R100 00 on a two-month credit basis. This is one leeway which could be resorted to at the time of need.

Further reading: *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 147; *Islām Aur Jadīd Maʿīshat Wa Tijārat*, p. 123; *Islām Aur Jadīd Maʿāshī Masāʾil*, vol. 7, p. 251; *Gharar Kī Sūratei*, pp. 334-337.

Allāh taʿālā knows best.

Exchanging one currency for a different currency

Question

There are two ways of sending money to another country:

1. A bank or person in South Africa is given one thousand dollars or eight hundred rands. After two or three days, a specified amount of rupees is collected in Karachi or Delhi. The wrong which seems to be committed here is that when a currency is exchanged for a currency, the two parties must take possession of it in the same assembly; and this is not found here.
2. Fifty thousand rupees are sent from Karachi to Lahore through a bank or someone else. Those very same rupees do not reach Lahore. Rather, that same amount is given to the recipient through the bank. Some scholars say that this is *saftajah* (bill of exchange) which is prohibited in the books of jurisprudence. It is also known as a bill of exchange.

What is the Sharīʿah ruling with regard to these two forms of exchange?

Answer

1. In the first case, rupees are received in return for dollars, and the currencies of two countries are classified as different species. This transaction will therefore be permissible with differences in the amounts. Furthermore, because this is a thaman ʿurfī and not a thaman haqīqī, it is not necessary for both parties to take possession of it in the same assembly. Yes, it is necessary for one party to take possession of it so that one abstains from bayʿ al-kālī bi al-kālī. A detailed fatwā on thaman ʿurfī not being under the ruling of thaman haqīqī was issued previously.

2. The second scenario appears to be *saftajah*. The root of this word means "to make a hole and store". In olden days, people used to make a whole in a walking stick [for example] and conceal their dirhams and dīnārs in it to protect them against thieves. They would then convey the coins in this way. This is why this is referred to as saftajah. The essence of *saftajah* is that a person gives one thousand dirhams as a loan to another person, and lays down the condition that he will collect this amount from him or from his representative in a certain city. The jurists says that this is prohibited because it falls under the ruling of:

كل قرض جر نفعا فهو ربا.

A loan which attracts a benefit is usury.

Because of this loan, the lender acquired safety for the movement of his money. This is why it is prohibited. However, there are two conditions. One is that it must be a loan. If a person gives the money as a trust (amānat) then there is no objection. If the entrusted item is destroyed, the person to whom the item belongs has been destroyed. The second condition is that the lender lays down the prerequisite that he is giving the loan on condition that the borrower must pay it to him in a certain city. If he lends the money without such a condition, and the borrower wrote to someone in the other city to pay the person there, then it will not be disapproved.

فشرط الكراهة أو عدم الجواز شيئان: الأول أن يدفع المال في بلده قرضاً لمن يكتب له، فلو دفعه أمانة لم يكره ولم يفسد. والثاني: أن يشترط عليه في عقد القرض أن يكتب له به إلى البلدة الأخرى فلو لم يشترط لم يكره، عن عطاء بن أبي رباح أن عبد الله بن الزبير رضي الله عنه كان يأخذ من قوم بمكة دراهم، ثم يكتب بها إلى مصعب بن الزبير رضي الله عنه بالعراق فيأخذونها منه، فسئل ابن عباس رضي الله عنه عن ذلك، فلم ير به بأساً، فقيل له: إن اخذوا أفضل من دراهمهم، قال: لا بأس إن اخذوا بوزن دراهمهم، وروي في ذلك عن علي رضي الله عنه.

فإن صح ذلك عنه، وعن ابن عباس رضي الله عنه فإنما أرادا والله أعلم إذا كان ذلك بغير شرط. السنن الكبرى للبيهقي: (٣٥٢/٥، دار المعرفة، بيروت).

(الفقه الحنفى وادلته، فقه المعاملات، القسم الاول، حكم السفتجة، ص ١٣٤)

<u>فتح القدير:</u>

والقرض بهذا الشرط فاسد ولو لم يكن مشروطاً جاز وصورة الشرط ما فى الواقعات رجل أقرض رجلاً مالاً على أن يكتب له به إلى بلد كذا فإنه لا يجوز، وإن أقرضه بغير شرط وكتب جاز. (فتح القدير: ٢٥١/٧، كتاب الحوالة، دار الفكر)

If the person give the dirhams as a loan to the bank or to any person, pays for the courier of the money, and then makes a condition in the transaction that he will collect the money in a certain city; then this will be permissible. This is because the benefit of acquiring a safe transport (here the objective is not safety but the conveyance of the money) is not because of the loan. Rather, a remuneration has been given for it, and the bank has been made the representative for the remuneration. Generally, a fee is paid for a money order or to a bank for conveying the money. There is no objection to such a transaction. Maulānā Fat<u>h</u> Mu<u>h</u>ammad Lucknowī ra<u>h</u>imahullāh writes in the marginalia of *Shar<u>h</u> al-Wiqāyah* that it is permissible. Details in this regard are to be found in *Takmilah 'Umdah ar-Ri'āyah*, vol. 2, p. 119.

Allāh ta'ālā knows best.

When a measured item becomes a weighted one

<u>Question</u>

It is common practice in villages for a woman to borrow three kilos of flour. She then returns the same amount after a few days. The books of jurisprudence state that wheat and flour are from among the measured items, and it is not permissible to change a measured item into a weighed item because even when there is equality in weight, their could be differences in measurement. What is the ruling of the Sharī'ah?

<u>Answer</u>

This is a loan agreement, and it is essential to return the same amount in a loan agreement. Since three kilos is an equal of three kilos, this agreement is permissible. It is also permissible to sell three kilos of

flour in return for three kilos flour in a non-deferred transaction. Since flour has become a weighted item – and Imām Abū Yūsuf ra<u>h</u>imahullāh is of the view that when a measured item becomes a weighted one in a society, then it is permissible to sell it for the same weight – the fatwā is issued on his view.

وقال مصطفى أحمد الزرقا: خلافاً لأبي يوسف الذي يعتبر المقياس المتعارف فيهما مطلقاً في كل زمن بحسبه، ويتبدل مقياس التساوي بتغير العرف تبعاً له حيث يعلل النص بالعرف الذي كان قائماً وقت وروده، فلا يكون اتباع العرف عند أبي يوسف مخالفاً للنص، بل يراه هو الموافق للنص، وأن الثبات على المقياس القديم الذي ورد فى النص هو المخالف للنص، فهو يعتبر هذاالنص نصاً عرفياً، بمعنى أنه ذكر فيه المقياس الذي عينه النص، لأنه كان هو المتعارف حين وروده النص، ولو كان المتعارف مقياساً آخر لورد النص بذلک الآخر، لأن مقاييس الكميات تتبع الأعراف، ولتنظررسالة "نشر العرف فيما بنى من الأحكام على العرف" لابن عابدين. وقد أوضحت هذه المسألة في كتابى المدخل الفقهى العام. (حاشية شرح القواعد الفقهية، ص ٢٢١، تحت القاعدة: العادة محكمة)

Allāh taʿālā knows best.

A forward exchange contract

Question

Is a forward exchange contract permissible? This is how it works:

It entails the exchange of currencies of different countries whereby, for example, dollars will be paid on a specified date in the future. This is known as a forward exchange rate. The specified date in the future is generally set at three months. The deferred value of the currency differs from the present cash value. In other words, it is paid with an additional amount.

For example, a South African company purchases goods from an American company for $100 000. Both parties agree that the goods will be handed over after three months and the price [$100 000] will also be paid at that time. During this three-month period, there is a strong

possibility of the value of the dollar increasing, due to which the South African company could suffer losses because it could be required to pay more rands for the same amount of dollars. To protect itself against this possible loss, the South African company enters into a forward exchange contract with a bank. The company buys the dollars at the current rate. It will pay the rands immediately but receive the dollars after three months – the time when it has to pay the dollars to the American company. What is the Sharīʿah ruling in this regard?

Answer

If a currency is sold for a different currency for the future, it could have the following three scenarios:

1. If dollars are bought in exchange for rands for the future, and all the rands were paid so that one will receive the dollars on a specified date at the end of three months, then this transaction could be included in *salam*. If the prerequisites for *salam* are fulfilled, the transaction is correct and permissible as a *salam* agreement.

The conditions for *salam* are to be found in this acronym:

"مص جنا مرأة" أو "امرأة مصت جنا"

1. The *mīm* represents the *miqdār* (amount) of the *salam* item.
2. The *ṣād* represents the *ṣifat*. The attribute of the item has to be known.
3. The *jīm* represents the *jins*. The genus of the item has to be known.
4. The *nūn* represents the *nauʿ*. The type or category of the item has to be known.
5. The *alif* represents the *ajal*. The time-period has to be known.
6. The *mīm rā* represent *miqdār ra's al-māl* – the capital amount.
7. The *tā* represents *tasmīyyatul makān* – the place has to be specified.

I am of the view that currencies fall under the classification of *fulūs-e-nāfiqah*, i.e. a currency which is in vogue. A currency is not a thaman ḫaqīqī because only gold and silver are classified as thaman ḫaqīqī.

In a *salam* transaction, it is essential to take possession of the capital amount. For the sake of possession (qabḏah), takhliyah and qabḏah ḫukmī will suffice. Also, if the amount is transferred into an account, it will suffice.

If the two parties do not engage in a *salam* transaction, they have the leeway of giving one currency at present and the other currency later on.

الفتاوى الهندية:

ويجوز السلم فى الفلوس عدداً في ظاهر الرواية كذا فى الينابيع وهو الصحيح هكذا فى النهاية. (الفتاوى الهندية: ١٨٣/٣، فصل فى بيان ما يجوز السلم)

فتح القدير:

وكذا فى الفلوس عدداً أى يجوز السلم فى الفلوس عدداً هكذا ذكره محمد فى الجامع الصغير من غير ذكر خلاف فكان هذا ظاهر الرواية عنه. (فتح القدير: ٧٥/٧، دار الفكر)

2. The second scenario is when the *rabb as-salam* does not pay anything. This is not permissible because it entails bayʿ ad-dayn bi ad-dayn. Furthermore, it is necessary to hand over the capital amount in a *salam* transaction.

قال فى الهداية: ولا يصح السلم حتى يقبض رأس المال قبل أن يفارقه فيه أما إذا كان من النقود فلأنه افتراق عن دين بدين وقد نهى النبي صلى الله عليه وسلم عن الكالئ بالكالئ. (الهداية: ٩٦/٣)

3. The third scenario is that a part of the capital amount is given, and not the entire amount. The transaction will be permissible in respect to the amount which was paid, while it will remain impermissible with respect to the unpaid amount. However, if a promise is made in scenario numbers two and three, and an agreement is not made, then there could be leeway for its permissibility. When the promise is in the form of a condition, it will be obligatory to fulfil it. For example, "If I give you the dollars on such and such date, you will have to sell me pounds at such and such price."

المواعيد في صورة التعليق تكون لازمة مثل أن يقول بع هذا الشيء من فلان بكذا فإن لم يعطك الثمن فأنا أعطيه. (شرح المجلة، للأتاسى، ٢٢٨/١، شرح القواعد الفقهية، ٢٦٣)

Mullā ʿAlī Qārī rahimahullāh writes:

المواعيد قد تكون لازمة، قال رسول الله صلى الله عليه وسلم: العدة دين فيجعل هذا الميعاد لازماً لحاجة الناس إليه. (شرح النقاية: ٣/٢٥٣، قبيل فصل الاقالة، بيروت)

Furthermore, this is one form of *hundī* (bill of exchange) in which there is room for deferment because it is a customary currency and not a genuine currency [gold or silver] in which there is no room for deferment.

Allāh taʿālā knows best.

Exchanging currencies of different countries

Question

A person gave R500 to another and said: "After three months, you must give me such and such amount of dollars in exchange for the rands." Is this permissible?

Answer

A currency is not a genuine thaman, but a customary one. Furthermore, countries have different names for their currencies. Therefore, it is not necessary for mutual taking of possession on the spot; it could be deferred.

The following is stated in *Fiqhī Maqālāt*:

Businessmen and people in general are in the habit of giving the currency of one country to a certain person and saying to him: "You must pay me such and such currency after such and such time at such and such place." Imām Abū Hanīfah rahimahullāh is of the view that this is permissible because when a thaman is sold, it is not a precondition for the thaman to be in the possession of the one selling it. Thus, if the currencies are different, it will be permissible to sell them on credit.

وإذا اشترى الرجل فلوساً بدراهم ونقد الثمن ولم تكن الفلوس عند البائع فالبيع جائز لأن الفلوس الرائجة كالنقود، وقد بينا أن حكم العقد في الثمن وجوبها ووجودها معا ولا يشترط قيامها في ملك بائعها لصحة العقد كما لا

يشترط ذلک فی الدراہم والدنانیر. (المبسوط للامام السرخسی: ۲٤/۱٤، باب البیع بالفلوس، ادارة القرآن)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

The currencies of different countries are classified as items of different categories. Their names, etc. are different. Since they are of different categories, it is permissible to sell the currency of one country for the currency of another country with differences in the amounts. It is also permissible to engage in such a business. However, it is essential for one of the two parties to take possession of either of the two currencies in the assembly of the transaction. If even one party does not take possession of it in the assembly, and each party promises to pay the other later on, this will not be permissible because it would entail separating while each one having a debt against the other. And this is impermissible as per the teachings of the Hadīth.

قال العلامة برہان الدين المرغيناني: وإذا عدم الوصفان الجنس والمعنى المضموم إليہ حل التفاضل والنساء لعدم العلة المحرمة والأصل فيہ الإباحة وإذا وجد حرم التفاضل والنساء لوجود العلة وإذا وجد أحدہما وعدم الآخر حل التفاضل وحرم النساء. (الہداية: ۷۹/۳، باب الربا، دار الفكر).[1]

Allāh taʿālā knows best.

Buying gold/silver with currency notes

Question

A person bought jewellery to the value of R50 000 from a jeweller. The buyer had R40 000 at the time. He paid the R40 000, took the jewellery and promised to pay the balance after one week. Is this transaction valid? After all, we know that in a bayʿ as-sarf, it is necessary for it to be a cash transaction.

Answer

Currency notes are not classified as thaman haqīqī but thaman ʿurfī. So the injunctions of bayʿ as-sarf will not apply in their trading. Therefore, it will be permissible to buy on credit. Yes, it is necessary to take possession of one of the two exchanges [the money or the

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[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 139.

jewellery] in the assembly so that it does not become bay' ad-dayn bi ad-dayn.

الدر المختار:

عقد الصرف بيع الثمن بالثمن أى ما خلق للثمنية ومنه المصوغ جنساً بجنس أو بغير جنس كذهب بفضة. (الدر المختار: ٢٥٧/٥، سعيد)

بدائع الصنائع:

فالصرف في متعارف الشرع اسم لبيع الأثمان المطلقة بعضها ببعض وهو بيع الذهب بالذهب والفضة بالفضة. (بدائع الصنائع: ٢١٥/٥، سعيد)

وفي رد المحتار: سئل الحانوتي عن بيع الذهب بالفلوس نسيئة فأجاب بأنه يجوز إذا قبض أحد البدلين. (فتاوى الشامى: ١٨٠/٥، باب الربا، سعيد)

وفى المبسوط للإمام السرخسي: إذا اشترى الرجل فلوساً بدراهم ونقد الثمن ولم تكن الفلوس عند البائع فالبيع جائز لأن الفلوس الرائجة ثمن كالنقود... وبيع الفلوس بالدراهم ليس بصرف. (المبسوط: ٢٤/١٤)

وللاستزادة انظر: (المحيط البرهانى: ٢٦٨/٧. والفتاوى الهندية: ٢٢٤/٣)

Fatāwā 'Uthmānī:

أما الذهب سواء كان تبراً أو مصوغاً فقد أجمع الأئمة الأربعة على أنه لا يعامل معاملة البضائع، وإنما يعمل أحكام النقود في جميع الأمور، لكن "الأوراق النقدية" قد وقع فيه خلاف بين العلماء المعاصرين، وإن كثيراً من علماء البلاد العربية جعلوها في حكم الذهب سواء بسواء، ولكن خالفتُهم في رسالتي "أحكام الأوراق النقدية" وذكرت أنها ليست قائمة مقام الذهب في جميع الأمور، فلا تجري فيها أحكام الصرف، ولذلك يجوز عندي أن يشترى الذهب أو الفضة بالنقود، ويجوز أيضاً أن يشترى الذهب نسيئة بالأوراق

النقدية ولكن يجب أن يكون تقابض أحد البدلين فى المجلس إذا كان ذهباً خالصاً، وأن يعرف الأجل عند العقد وقد قبل ہذا الموقف معظم علماء الهند وكثير من باكستان، والتفصيل في رسالتي "أحكام الأوراق النقدية". (فتاوىٰ عثمانی: ۱۵۹/۳، کتاب البیوع)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

Take the following example of selling gold/silver on credit: A person bought gold jewellery and paid part of the money now and promised to pay the balance later on; or bought the entire amount of jewellery on credit. The Sharīʿah ruling in this regard is that since the sale and purchase of gold/silver through currency notes does not fall under the injunctions of bayʿ as-sarf, it is permissible to buy and sell on credit provided possession is taken of either of the one in the assembly of the transaction. This is so that it does not fall under the ruling of bayʿ al-kālī bi al-kālī.

وفى الهندية: قال: وروى الحسن عن أبي حنيفة إذا اشترى فلوساً بدراہم وليس عند ہذا فلوس ولا عند الآخر دراہم ثم أن أحدہما دفع وتفرقا جاز وإن لم ينقد واحد منها حتى تفرقا لم يجز كذا فى المحيط. (الفتاوى الهندية: ۲۲٤/۳، الفصل الثالث فى بيع الفلوس)-[1]

Ahsan al-Fatāwā:

Currency notes are not like gold and silver coins. Neither are they receipts for gold and silver. This is why it is permissible to buy gold and silver with them under all conditions – with differences in amounts and also on credit.

Some ʿulamāʾ are of the view that it is impermissible. As a precautionary measure, a person could take a loan from the jeweller and then engage in a cash transaction.

Allāh taʿālā knows best.

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[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 128.

The Sharī'ah ruling with regard to Forex

Question

How does Forex work and what is the Sharīʿah ruling with regard to it?

Answer

The essence of Forex can be understood as follows: Zayd opens a bank account with $1 000. The company adds $99 000 into his account as a loan. He can now trade with $100 000. After that, he can purchase a plot for $100 000 from a bank via the company. In other words, a guarantee of $100 000 came to him. After some days, the value of the dollar increases so he phones the bank to sell the $100 000 in exchange for pounds via the company. The company sells the dollars in return for pounds. The company provides the following services:

1. Telephonic contact.
2. The market where the person can conduct his business.
3. Internet system.
4. Providing $99 000 as a guarantee.

A few other services are also provided.

When the sale and purchase of the currency takes place, the company takes a specified amount as a commission. If, after buying the currency, there is a delay in selling it, the company charges a certain amount daily.

We are of the view that this business seems to be permissible. Nonetheless, there are certain objections to it.

1. The person does not take possession of the currency whereas it is essential to take possession of it during a sale and purchase. In other words, at the time of the purchase and sale, neither the person nor his representative has the amount with him. Rather, it is written into his account.

The answer is that since Zayd can do business with the amount which has come into his account, it is synonymous to taking legal possession of it, even though physical possession has not been realized.

Maʿāyīr Sharʿīyyah has been compiled by twenty-seven expert muftīs. The following is stated therein:

يتحقق القبض بحصوله حقيقة أو حكماً وتختلف كيفية قبض الأشياء بحسب حالها واختلاف الأعراف وبما يكون قبضاً لها، إذا أودع في حساب العميل مبلغ من المال مباشرة أو بحوالة مصرفية إلى آخر ما قال... (معايير شرعيه، ص ١٢٢)

We learn from the above that when an amount is transferred into a person's account in such a way that he can trade with it, then it is classified as a legal possession.

إن الفائدة المطلوبة بالعقد إنما هي التمكن من التصرف وذلك يترتب على التعيين فلا يحتاج إلى القبض. (شرح العناية: على هامش فتح القدير: ١٨/٧، دار الفكر)

ʿAsr-e-Hādir Ke Peichīdah Masā'il:

Once an entry is made in a bank's register in favour of a person, it will be considered to be a valid "possession" if he wants to change one currency for another. This is irrespective of whether it is required in the currency which the person is giving to the bank, or in the currency which the bank has.[1]

2. The amount taken from the company is a debt which is shouldered by Zayd. Only this amount is written in Zayd's account. The pounds which he bought are also recorded in it. In other words, it is a debt. This will be impermissible on the basis of bayʿ ad-dayn bi ad-dayn.

We already concluded that once the amount is reflected in his account, it is synonymous to a legal possession. So he can use it for buying and selling. In other words, he has full power to exercise his will over it. How, then, can it be a bayʿ ad-dayn bi ad-dayn? In fact, the dollars were recorded in this account from before and he had legal possession over them. When the pounds were included in his account, they too came under his possession. Therefore, bayʿ ad-dayn bi ad-dayn did not take place. There is no reason for saying that it is impermissible.

3. The commission which the company collects appears to be for the loan which the company gave to Zayd. This is an usurious transaction, and therefore impermissible.

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[1] Qādī Mujāhidul Islām Qāsimī, *ʿAsr-e-Hādir Ke Peichīdah Masā'il*, p. 232.

This is a payment for the brokerage which is collected from both parties. And it is permissible to collect a commission from both parties. Since the company provides various services, it ought to be permitted to charge service fees. The books of jurisprudence state that it is permissible to charge a percentage commission from both parties.

Ahsan al-Fatāwā:

Question: Is it permissible to collect payment for brokerage from both parties?

Answer: It is permissible provided the amount is clearly stated.

قال فى الشامية من البزازية: إجارة السمسار والمنادى والحمامى والصكاك وما لا يقدر فيه الوقت ولا العمل تجوز. (رد المحتار: كتاب الاجارة، باب الاجارة الفاسدة، ٦/٤٧، سعيد)[1]

Further reading: *Radd al-Muhtār*, vol. 4, p. 560; *Fatāwā Mahmūdīyyah*, vol. 25, p. 286; *Nizām al-Fatāwā*, vol. 1, p. 297; *Mahmūd al-Fatāwā*, vol. 3, p. 85.

The commission which is collected neither falls under interest nor gambling. Rather, it is permissible as a payment for brokerage.

4. The company lays down the condition that Zayd must use the loan in a market. This is permissible just as it is permissible to take a mortgage or guarantor for the protection of a loan. In a loan agreement, hawālah and kafālah are laid down for the guarantee of the loan.

5. The company is a representative for the buyer and seller. It seems that one person is a simultaneous representative for the buyer and seller.

The answer to this is that one person can be a representative for a buyer and seller if he has been permitted by the one who appointed him.

الوكيل بالبيع لا يملك الشراء لنفسه لأن الواحد لا يكون بائعاً ومشترياً فيبيعه من غيره ثم يشتريه منه، وإن أمره الموكل أن يبيعه من نفسه وأولاده الصغار أو ممن لا تقبل شهادته فباع منهم جاز. (فتاوى الشامى، باب الوكالة

[1] *Ahsan al-Fatāwā*, vol. 7, p. 272.

بالبيع والشراء، ٥/٥٢٣، سعيد. وكذا فى البحر الرائق: ١٦٧/٧، فصل فى الوكيل بالبيع، كوئته)

6. If Zayd delays in selling the currency, he will be charged a certain amount daily. This is interest. It is imperative to abstain from this. If this condition is removed, the transaction will be permissible.

Allāh taʿālā knows best.

Selling a silver ring which has a gem-stone set in it

Question

A person sold a silver ring which had a gem-stone set in it. He sold both in return for two hundred dirhams (silver) – some of which was paid in cash and some was deferred. Is this transaction permissible? Will the ruling change if it is possible or not possible to separate the gem-stone from the silver?

Answer

It will be necessary to pay in cash the amount of money which is equal to the amount of silver which is in the ring. If it was not paid, and the gem-stone could be separated without damaging the ring, then only the sale of the gem stone will be valid. If the gem-stone cannot be separated without damaging the ring, the transaction will be invalid with respect to both items [the ring and the gem-stone].

In other words, if a person sold a ring which had a gem-stone, for two hundred dirhams – some of them in cash and some on credit – if the silver of two hundred dirhams weighs more than the silver found in the ring, and the buyer paid the full amount or paid only the amount for the ring, and deferred the payment of the balance, the transaction in both cases will be permissible.

If the buyer did not make any payment, and both separated – if it is easy to separate the gem-stone from the ring, the transaction with respect to the gem-stone is valid, and invalid with respect to the ring. If it is not possible to separate the gem-stone, the transaction will be invalid with respect to both.

الفتاوى الهندية:

وإذا باع الرجل من آخر حلي ذهب فيه لؤلؤ وجوهر بدنانير وقبض المشترى الحلي ...فإن كانت الدنانير اللتي هي ثمن أكثر من ذهب الحلي فإنه يجوز البيع فى الذهب والجوهر ثم بعد ذلک إن نقد الثمن كله قبل أن يفترقا فالعقد ماضٍ على الصحة وكذلک إن نقد حصة الذهب الذي فى الحلي، وإن لم ينقد شيئاً حتى تفرقا فالعقد فيما يخص الحلي من الذهب يفسد وفيما يخص الجوهر إن كان الجوهر بحيث لا يمكن تخليصه إلا بضرر يفسد وإن أمكن تخليصه من غير ضرر لا يفسد العقد فى الجوهر هكذا فى المحيط. (الفتاوى الهندية: ٢٢٢/٣، الفصل الثانى فى بيع السيوف المحلاة ، كتاب الصرف)

الدر المختار:

من باع سيفاً حليته خمسون... فباعه بمائة وقد نقد خمسين فما نقد فهو ثمن الفضة... فإن افترقا من غير قبض بطل فى الحلية فقط وصح فى السيف لعدم اشتراط قبض ثمنه فى المجلس إن يخلص بلا ضرر وإن لم يخلص إلا بضرر بطل أصلاً لتعذر تسليم السيف بلا ضرر كبيع جذع من السقف، نهر. (الدر المختار مع فتاوى الشامى: ٢٦٢/٥، سعيد)

الهداية:

لو باع سيفاً محلى بمائة درهم وحليته خمسون ودفع من الثمن خمسين جاز البيع... فإن لم يتقابضا حتى افترقا بطل العقد فى الحلية لأنه صرف فيها وكذا فى السيف إن كان لا يتخلص إلا بضرر وإن كان يتخلص السيف بغير ضرر جاز البيع فى السيف وبطل فى الحلية. (الهداية: ١٠٦/٣، كتاب الصرف)

وللمزيد أنظر: المبسوط للامام السرخسى: ١٨/١٤، كتاب الصرف، ادارة القرآن. والمحيط البرہانى: ٣٣٢/٨، كتاب الصرف، رشيديه)

Allāh taʿālā knows best.

Selling a currency at a rate which is different from the government-stipulated one

<u>Question</u>

What is the ruling with regard to selling a currency at a rate which is different – whether more or less – than the rate stipulated by the government?

<u>Answer</u>

There is no objection whatsoever to its permissibility. This is because when one currency is sold for another, it is permissible to sell it at an increased or decreased price. However, this will entail breaking a law of the government. It is essential for a Muslim to maintain his self-respect. If there is a danger to his respect, he must abstain from such an action. It is highly foolish to put one's respect into danger for the sake of a few cowries.

Fiqhī Maqālāt:

If a person exchanges a currency for another one at a price which is different from the government rate, it will not be classified as usury. This is because the currencies are of different denominations, and it is permissible to exchange them at an increased or decreased price. The Sharīʿah has not laid down any limit to this; it is dependent on the mutual agreement of the two parties. However, the rules of tasʿīr (price fixing) will apply. Jurists who say that tasʿīr is permissible in items specified by the government, then it will be permissible in currencies as well...Therefore, it is impermissible to break this law of the government (provided it is an Islamic government which adheres to Islamic principles; not like present-day governments). At the same time, we cannot say it is <u>h</u>arām by classifying it as usury.

Further reading: *Fatāwā Ma<u>h</u>mūdīyyah*, vol. 16, p. 148; *Fatāwā Ra<u>h</u>īmīyyah*, vol. 9, p. 222; *Kifāyatul Muftī*, vol. 7, p. 356.

Allāh taʿālā knows best.

Trading in a foreign currency

<u>Question</u>

What is the ruling with regard to trading in a foreign currency? Assuming a Muslim does this as a business and invites other Muslims to invest in it, will we say that they have invested their money in a lawful place?

Answer

Trading in a foreign currency is permissible. Differences in the price are also permissible. This is because currencies of different countries are classified as different species. In our times, a currency note is not a genuine currency, but a customary one. This business is therefore permissible. Based on this, it will be permissible to invest in a business of this nature. The money invested in it will be invested in a lawful place.

Proofs were given in detail previously.

Allāh taʿālā knows best.

Selling R5-coins at higher or lower prices

Question

When our past president (Nelson Mandela) turned ninety, our Reserve Bank issued R5-coins containing his image. A limited number of these coins was minted. If a person were to obtain them from South African banks, they would cost him R5; but he could sell them for R1000 in foreign countries. This is because this coin has become a collector's coin. Can I buy these coins locally and sell them overseas? Is it permissible for me to do this?

Answer

If the R5-coin is sold for a higher or lower price in return for a different currency, it is certainly permissible. If it is sold for the same currency, then the scholars differ. Some of them say it is permissible because it is not classified as a genuine currency. A person has the leeway of practising on the view of Imām Abū Hanīfah rahimahullāh and Imām Abū Yūsuf rahimahullāh in this regard.

ويجوز بيع الفلس بالفلسين بأعيانهما عند أبي حنيفة وأبي يوسف وقال محمد لا يجوز. ولهما أن الثمنية في حقهما تثبت باصطلاحهما إذ لا ولاية للغير عليهما فتبطل باصطلاحهما وإذا بطلت الثمنية تتعين بالتعيين. (الهداية، باب الربا، ٣/٨١)

Practising on the view of Imām Abū Hanīfah and Imām Abū Yūsuf rahimahumallāh can be envisaged with respect to money which is treated as an item in itself. Some people are in the habit of collecting coins and currency notes of various countries. The purpose is not to use those coins and notes for exchange purposes, for engaging in

transactions, or for accruing profits. Rather, they collect them for their historical value. When a currency ceases to exist in the future, the coins or notes which they have may remain as a historical memory. For currencies of this nature, we could follow the view of these two jurists and say that they could be exchanged for higher or lower prices.[1]

If such a coin/note is bought as money – e.g. an old note is bought for a new one – then some muftīs say that it is permissible.

Niẓām al-Fatāwā:

A currency note is neither measured nor weighed; it is counted. It is therefore permissible to exchange it at a higher or lower price.[2]

Fatāwā Farīdīyyah:

Question: Is it permissible for a person to sell a one thousand rupee note for a ten rupee note?

Answer: Both the notes are made of paper; they are neither of gold nor silver. This exchange is not usury and therefore not impermissible. Their intrinsic value is insignificant, while their governmental value is extra ordinary. This exchange will neither be unlawful on the basis of societal norms nor on the basis of the Sharīʿah. The same can be said about dollars and other paper currencies.[3]

A detailed discussion on this issue has passed. Please refer to it.

Allāh taʿālā knows best.

Exchanging gold for gold

Question

Zayd has five ounces of 22carat gold jewellery which is quite old. He goes to a jeweller and asks for five ounces of jewellery of a certain new design. The jeweller says that he will have to pay an additional R3 000 with his old jewellery. Is this transaction permissible?

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[1] *Fiqhī Maqālāt*, vol. 1, p. 37.

[2] *Niẓām al-Fatāwā*, vol. 1, p. 299.

[3] *Fatāwā Farīdīyyah*, vol. 2, p. 677.

Answer

This is an interest transaction and it is unlawful. What Zayd could do is sell his jewellery for – example – R50 000 and buy new jewellery for R53 000. This transaction will be permissible.

قوله عليه الصلاة والسلام: لا تبيعوا الذهب بالذهب والورق بالورق إلا سواء بسواء. قال العلماء: هذا يتناول جميع أنواع الذهب والورق من جيد ورديئ، وصحيح ومكسور، وحلي وتبر وغير ذلك، وسواء الخالص والمخلوط بغيره، وهذا كله مجمع عليه. (شرح الامام النووى لصحيح مسلم: ١٢/١١، بيروت)

وانظر للمزيد: (المؤطا، ص ٥٨٢، نور محمد كتب خانه. والمصنف لعبد الرزاق: ١٢٥/٨، ادارة القرآن والعلوم الاسلامية)

المبسوط:

حديث أنس بن مالك رضي الله عنه قال: أتى عمر بن الخطاب رضي الله عنه بإناء خسرواني قد أحكمت صنعته فبعثني به لابيعه فأعطيت به وزنه وزيادة فذكرت ذلك لعمر رضي الله عنه فقال: أما الزيادة فلا، وهذا الإناء كان من ذهب أو فضة وفيه دليل على أنه لا قيمة للصنعة فى الذهب والفضة عند المقابلة بجنسها لأنه لم يجوز الاعتياض عنها وما كان مالاً متقوماً شرعاً فالاعتياض عنه جائز فعرفنا أنه إنما لم يجوز لأنه لا قيمة للصنعة في هذه الحالة شرعاً. (المبسوط للامام السرخسى: ٤/١٤، كتاب الصرف، ادارة القرآن)

الفتاوى الهندية:

وإن اشترى خاتم فضة أو خاتم ذهب فيه فص أو ليس فيه فص بكذا فلساً وليست الفلوس عنده فهو جائز تقابضا قبل التفرق أو لم يتقابضا لأن هذا بيع وليس بصرف، كذا فى المبسوط. (الفتاوى الهندية: ٢٢٤/٣)

المبسوط:

ولا بأس ببيع الفضة جزافاً بالذهب أو بالفلوس أو بالعروض لانعدام الربا بسبب اختلاف الجنس. (المبسوط للامام السرخسی: ٦٩/١٤، كتاب الصرف، ادارة القرآن)

وانظر: (رد المحتار: ١٧٩/٥، سعيد. والبحر الرائق: ١٩٤/٦. وفتح القدير: ٢٧٨/٦، دار الفكر. والمحيط البرہانی: ٣٠٥/٨)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

Currency notes and coins do not fall under the ruling of gold and silver. Neither are they receipts for gold and silver. This is why it is permissible to buy gold and silver with them – whether jewellery or dirhams. The rules of bayʿ as-sarf do not apply to them.[1]

قولہ علیہ السلام: لا تفعل بع تمرک بالدراہم ثم اشتر بالدراہم جنیباً، وقال: فی المیزان مثل ذلک، أی قال: ما یوزن إذا احتیج إلی بیع بعضہ ببعض مثل ذلک القول الذي قال فی التمر المکیل أی یباع غیر الجید الموزون بثمن ثم یشتري بہ موزون جید... قولہ بع تمرک الخ أشار إلیہ بما یجتنب بہ عن الربا مع حصول المقصود، وبہ احتج جماعة من فقہائنا وغیرہم علی جواز الحیلة فی الربا وبنوا علیہا فروعاً. (التعلیق الممجد: علی ہامش المؤطا للامام محمد، ص ٣٥٤، قدیمی کتب خانہ)

وکذا فی (تکملة فتح الملہم: ٥٦٥/١. المبسوط للامام السرخسی: ٢٠٩/٣. وجدید معاملات کے شرعی احکام: ١٣٢/١. وفتاویٰ عثمانی: ١٥٩/٣)

Allāh taʿālā knows best.

[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 128.

Buying gold with a credit card

<u>Question</u>

A person buys gold with a credit card. Will the transaction be permissible? Will the rules of bay' as-sarf apply to it?

<u>Answer</u>

When a seller accepts a debit card from a customer and enters his account number with the bank, and the bank transfers the money which is in the customer's account into the seller's account; then the seller has taken possession of the money. This is permissible. On the other hand, in the case of a credit card, the amount will be transferred into the seller's account the next day. Yes, he does take possession of a receipt which is synonymous to a legal possession. In reality, this is not a bay' as-sarf because in such a transaction, either of the two parties must have a genuine currency – gold or silver. In this case, there is a genuine currency on one side while the other party has a customary currency; and the latter does not fall under the rules of a genuine currency. It is not necessary to take possession of it there and then. Yes, one of the two will have to be taken possession of so that it does not entail bay' ad-dayn bi ad-dayn.

<u>الدر المختار:</u>

عقد الصرف بيع الثمن بالثمن أى ما خلق للثمنية ومنه المصوغ جنساً بجنس أو بغير جنس كذهب بفضة. (الدر المختار: ٢٥٧/٥، سعيد)

<u>بدائع الصنائع:</u>

فالصرف في متعارف الشرع اسم لبيع الأثمان المطلقة بعضها ببعض وهو بيع الذهب بالذهب والفضة بالفضة. (بدائع الصنائع: ٢١٥/٥، سعيد)

وفي رد المحتار: سئل الحانوتي عن بيع الذهب بالفلوس نسيئة فأجاب بأنه يجوز إذا قبض أحد البدلين. (فتاوى الشامى: ١٨٠/٥، باب الربا، سعيد)

وفى المبسوط للإمام السرخسي: إذا اشترى الرجل فلوساً بدراہم ونقد الثمن ولم تكن الفلوس عند البائع فالبيع جائز لأن الفلوس الرائجة ثمن كالنقود... وبيع الفلوس بالدراہم ليس بصرف. (المبسوط: ٢٤/١٤)

وللاستزادة انظر: (المحيط البرہانى: ٢٦٨/٧. والفتاوى الہندية: ٢٢٤/٣، وفتاوىٰ عثمانى، وجديد معاملات كے شرعى احكام، كما مر)

Detailed rules related to credit cards can be seen in the chapter on usury.

Allāh taʿālā knows best.

INTEREST/USURY

Accepting usury in South Africa

<u>Question</u>

Is it permissible for Muslims living in South Africa to accept usury from non-Muslim banks?

<u>Answer</u>

South Africa is classified as dār al-amn; it is not a dār al-<u>h</u>arb. Even if it were a dār al-<u>h</u>arb, it will not be permissible for the citizens here to accept usury from a non-Muslim bank or a non-Muslim individual. Yes, if a Muslim of South Africa goes to China, America or Russia, lives there temporarily, and receives profits from the non-Muslim banks there or from non-Muslim citizens of those countries – and they give it willingly – then if we classify those countries as dār al-<u>h</u>arb, then this transaction will be permissible according to Imām Abū <u>H</u>anīfah ra<u>h</u>imahullāh and Imām Mu<u>h</u>ammad ra<u>h</u>imahullāh.

Allāh taʿālā knows best.

The issue of usury in a dār al-<u>h</u>arb

<u>Question</u>

The jurists state that a Muslim musta'man who goes to a dār al-<u>h</u>arb after obtaining a visa for entry into that country and a new Muslim <u>h</u>arbī – both can accept usury from a kāfir <u>h</u>arbī. Furthermore, an original Muslim who is a citizen of a dār al-<u>h</u>arb can accept usury from a <u>h</u>arbī in the dār al-<u>h</u>arb. Yes, an original Muslim of a dār al-<u>h</u>arb or a musta'man <u>h</u>arbī cannot pay usury. Can we who are now the original residents of South Africa and have been living here for the last two hundred years, accept usury from non-Muslims?

<u>Answer</u>

There is difference of opinion among the <u>H</u>anafī jurists. Imām Abū <u>H</u>anīfah and Imām Mu<u>h</u>ammad ra<u>h</u>imahullāh are of the view that it is permissible – with certain conditions – to accept usury from a <u>h</u>arbī. However, the majority of jurists, the three Imāms and Imām Abū Yūsuf ra<u>h</u>imahullāh are of the view that there is no way that interest can be permissible, even if it is when dealing with a <u>h</u>arbī.

الهداية:

ولا ربا بين المسلم والحربي في دار الحرب خلافاً لأبي يوسف والشافعي لهما الاعتبار بالمستأمن منهم في ديارنا، ولنا قوله عليه السلام : لاربا بين المسلم والحربي في دارالحرب. ولأن ما لهم مباح في دارهم فبأي طريق أخذه المسلم أخذ مالاً مباحاً إذا لم يكن فيه غدر بخلاف المستأمن منهم لأن ماله صار محظوراً بعقد الأمان. (الهداية: ٨٦/٣)

بدائع الصنائع:

إذا دخل مسلم أو ذمي دار الحرب بأمان فعاقد حربياً عقد الربا أو غيره من العقود الفاسدة في حكم الإسلام جاز عند أبي حنيفة ومحمد... وقال أبو يوسف: لا يجوز للمسلم في دار الحرب إلا ما يجوز له في دار الإسلام. (بدائع الصنائع: ١٣٢/٧، كتاب السير، سعيد)

وللاستزادة: (البحر الرائق: ٢٢٦/٦، كوئته. وتبيين الحقائق: ٧٤٢/٤. ومجمع الانهر شرح ملتقى الابحر: ١٨٦/٥. ومنحة الخالق على هامش البحر الرائق: ٢٢٦/٦، كوئته. ورد المحتار: ١٨٦/٥، باب الربا، سعيد. وفتح القدير: ٣٨/٧، باب الربا، دار الفكر)

Some latter day Hanafī jurists gave preference to the view of the majority and classified the view of Imām Abū Hanīfah and Imām Muhammad rahimahumallāh as non-preferred due to some reasons. Some of the reasons for their preference are:

1. There are many differences among the 'ulamā' on the definition of dār al-harb. Therefore, it cannot be said with certainty that a certain country is a dār al-harb.

2. The majority of jurists say that usurious transactions are impermissible even in a dār al-harb. This causes confusion. And in matters related usury, even a doubtful usury is prohibited.

3. The texts declare a general prohibition of interest. For example,

أَحَلَّ اللّٰهُ الْبَيْعَ وَحَرَّمَ الرِّبَا.

> Allāh permits trade and prohibits usury.[1]

فَإِنْ لَّمْ تَفْعَلُوْا فَأْذَنُوْا بِحَرْبٍ مِّنَ اللّٰهِ وَرَسُوْلِهِ.

> If you do not desist, prepare to fight Allāh and His Messenger.

There are many other verses and Ah̲ādīth containing severe warnings against usury. Anyone hearing them will not have the audacity to involve himself even in a doubtful usurious transaction.

4. The view of the majority is based on caution.

5. By practising on the view of the majority, a person will be saved from the differences of the jurists.

No matter what, it is totally forbidden to accept interest.

Further reading: *Fatāwā Mah̲mūdīyyah*, vol. 16, p. 352; *Ah̲san al-Fatāwā*, vol. 7, p. 20; *Jadīd Fiqhī Masā'il*, vol. 4, p. 62; *Fatāwā Bayyināt*, vol. 4, p. 96; *Kifāyatul Muftī*, vol. 8, p. 103.

Some scholars have chosen the view of Imām Abū H̲anīfah and Imām Muh̲ammad rah̲imahumallāh.

Refer to: *Majmūʿatul Fatāwā*, vol. 2, p. 170; *Imdād al-Ah̲kām*, vol. 3, p. 451-452.

Definition of dār al-harb

Observe the various opinions of the scholars on the definition of dār al-h̲arb.

جامع الرموز:

دار الحرب ما خافوا فيه من الكافرين. (جامع الرموز: ٥٥٦/٥، باب الجهاد)

خزانة المفتين:

دار الإسلام لا تصير دار الحرب إلا بإجراء أحكام الشرك فيها، وان يكون متصلة بدار الحرب لا يكون بينهما وبين دار الحرب مصر آخر للمسلمين،

[1] Sūrah al-Baqarah, 2: 275.

ولا يبقى فيها مسلم أو ذمی آمناً بالأمان الأول، فما لم توجد ہذہ الشرائط، لا تصير دار الحرب، ومعنى قولنا: أن لا يبقى مسلم أو ذمي آمناً بالأمان الأول، أن لا يبقى فيها مسلم أو ذمي آمناً على نفسه إلا بأمان المشركين، وقالا: إذا أجروا فيها أحكام الشرك فإنها تصير دار الحرب، سواء كانت متصلة بدار الحرب أو لم تكن، بقي فيها مسلم أو ذمي آمناً بالأمان الأول أو لم يبق. (خزانة المفتين بحوالة مجموعة الفتاویٰ: ١٤٠/١، كتاب العلم والعلماء، آرام باغ کراچی)

الفتاوى البزازية:

وذكر الحلواني: إنما تصير دار الحرب بإجراء أحكام الكفر، وأن لا يحكم فيها بحكم من أحكام الإسلام ، وأن يتصل بدار الحرب، وأن لا يبقى فيها مسلم ولا ذمي آمناً بالأمان الأول... فإذا وجدت الشرائط كلها صارت دار الحرب، وعند تعارض الدلائل والشرائط يبقى ما كان على ما كان أو يترجح جانب الإسلام احتياطاً. (الفتاوى البزازية بهامش الهندية: ٣١٢/٦، كتاب السير)

فتاویٰ قاضيخان:

إذا أجرى أهل الحرب في بلدة من بلاد أهل الإسلام أحكام أهل الحرب، تصير دار الحرب كيف ما كان. (فتاویٰ قاضيخان بهامش الهندية: ٥٨٤/٣)

بدائع الصنائع:

لا خلاف بين أصحابنا في أن دار الكفر تصير دار الإسلام بظهور أحكام الإسلام فيها واختلفوا في دار الإسلام أنها بماذا تصير دار الكفر، قال أبو حنيفة: إنها لا تصير دار الكفر إلا بثلاث شرائط: أحدہا ظهور أحكام الكفر فيها، والثاني: أن تكون متاخمة لدار الكفر، والثالث: أن لا يبقى

فيها مسلم ولا ذمي آمناً بالأمان الأول وهو أمان المسلمين، وقال أبو يوسف ومحمد: إنها تصير دار الكفر بظهور أحكام الكفر فيها. (بدائع الصنائع: ١٣٠/٧، سعيد)

فتاوى الشامى:

لو أجريت أحكام المسلمين وأحكام أهل الشرك لا تكون دار حرب.

وفى الدر المختار: ودار الحرب تصير دار الإسلام بإجراء أحكام أهل الإسلام فيها كجمعة وعيد وإن بقي فيها كافر أصلي وإن لم تتصل بدار الإسلام، درر. (فتاوى الشامى مع الدر المختار: ١٧٥/٤، سعيد)

Īdāh an-Nawādir:

A dār al-jamhūrīyyah (republic) refers to a government which is neither fully in the hands of Muslims nor fully in the hands of non-Muslims. Furthermore, the members of the upper house are neither entirely Muslim nor non-Muslim. Rather, there is a constitutional agreement between Muslims and non-Muslims to run the country and to enjoy residential rights. Members of each party can take part in elections, occupy key posts, and have full rights to participate in the administration of the government. Although there will be more members of a certain population group because of it being in the majority, the right to express one's views is enjoyed equally by everyone. Each population group has the freedom to practise its religion. A government of this nature can neither be classified a dār al-Islām nor a dār al-harb. Rather, it is a dār al-jamhūrīyyah. It can also be referred to as a dār al-amn, dār al-ʿahd or a secular country.

Further reading: *al-Fiqh al-Islāmī Wa Adillatuhu*, vol. 8, p. 39; *al-Fatāwā al-Hindīyyah*, vol. 2, p. 232; *Jadīd Fiqhī Masā'il*, vol. 4, pp. 72-74; *Jadīd Fiqhī Mabāhith*, vol. 2, pp. 353, 372, 473, 474.

The majority of jurists say that it is prohibited to accept usury even in a dār al-harb.

فقد اشتهر عن مالك والشافعي وأحمد وأبي يوسف وغيرهم من جماهير الفقهاء تحريمهم الربا بين المسلم والحربي في دار الحرب،... وقد اتفقت الأمة على أن

الخروج من الخلاف مستحب قطعاً، لأن خلاف الأئمة لا سيما خلاف جمهورہم يورث الشبهة فى الجواز، وقد قال النبي صلى الله عليه وسلم: الحلال بين والحرام بين وبينهما شبهات، فمن اتقى الشبهات فقد استبرأ لدينه. لا سيما وكون الهند دار الحرب، عند الإمام محل نظر بعد، فالشبهة إذن قوية غير ضعيفة، والتوقي عنه واجب من غير ريبة. (اعلاء السنن: ٣٧٩/١٤، ادارة القرآن)

In the same way, it is questionable to refer to South Africa as a dār al-harb. It is against the reality.

Imdād al-Muftīyyīn:

...The Sahābah radiyallāhu ʿanhum, Tābiʿūn and Imāms of Islam always preferred the side of caution in matters related to usury. Hadrat ʿUmar radiyallāhu ʿanhu said:

> فدعوا الربا والريبة. (رواه ابن ماجه في باب التغليظ في الربا)
>
> Give up usury and give up anything which is akin to usury.

Hadrat Shaʿbī rahimahullāh relates from Hadrat ʿUmar radiyallāhu ʿanhu:

> تركنا تسعة أعشار الحلال مخافة الربا. (مصنف عبد الرزاق، ج ٨، ص ١٥٢، باب طعام الأمراء وأكل الربا)
>
> We cast aside nine tenths of halāl out of fear of falling into usury.

This is why the erudite scholars have issued a verdict of prohibition with regard to accepting interest from banks of unbelievers. This is based on caution.[1]

[1] *Imdād al-Muftīyyīn*, vol. 2, p. 705.

Further reading: *Fatāwā Haqqānīyyah*, vol. 6, p. 209; *ʿAzīz al-Fatāwā*, vol. 1, pp. 621-623; *Imdād al-Fatāwā*, vol. 3, pp. 153, 159; *Kifāyatul Muftī*, vol. 8, p. 75; *Īdāh an-Nawādir*, vol. 1, p. 97.

To summarize: South Africa is neither a dār al-Islām nor a dār al-harb; it is a dār al-amn. It is therefore prohibited to accept usury from a non-Muslim bank. Nowadays, Muslims prefer living in non-Muslim countries than in Muslim countries. They feel that they are safe in non-Muslim countries. How, then, can it be permissible for them to accept usury in such countries? As though they believe that these countries are better than Muslim countries to live in, yet they consider them as dār al-harb for the sake of devouring usury. This is a type of deception which is not approved by the Sharīʿah.

Allāh taʿālā knows best.

The preferred view on the issue of usury in a dār al-harb

Question

What is the preferred Hanafī view with regard to accepting usury in a dār al-harb? Imām Abū Hanīfah and Imām Muhammad rahimahumallāh quote the following Hadīth as their evidence. Is this Hadīth authentic? What is the reply to this Hadīth?

لا ربا بين المسلم والحربي في دار الحرب.

> There is no usury between a Muslim and a harbī in a dār al-harb.

Answer

As regards proofs, the view of Imām Abū Yūsuf rahimahullāh and the majority of jurists is stronger and more harmonious to our times. Since Muslims are living peacefully in most countries and carrying out their acts of worship easily, they are not permitted to accept usury. Furthermore, the three Imāms are of the view that it is prohibited to accept usury even in a dār al-harb. Bearing in mind their proofs and in consideration of their view, no permission whatsoever will be given to accept usury. Hence, this view is given preference in the Hanafī madhhab.

Ibn Qudāmah rahimahullāh writes:

ويحرم الربا في دار الحرب كتحريمه في دار الإسلام وبه قال مالك والأوزاعي وأبو يوسف والشافعى وإسحاق، وقال أبو حنيفة: لا يجرى الربا بين مسلم وحربي في دار الحرب. (المغنى: ٤/١٦٢، فصل حرمة الربا فى دار الحرب)

Proofs of those who say that it is prohibited

1. The Qur'ān and Hadīth contain absolute prohibitions with reference to usury, and they contain severe warnings as well.

أَحَلَّ اللهُ الْبَيْعَ وَحَرَّمَ الرِّبَا.

Allāh permits trade and prohibits usury.[1]

اَلَّذِيْنَ يَأْكُلُوْنَ الرِّبٰوا لَا يَقُوْمُوْنَ إِلَّا كَمَا يَقُوْمُ الَّذِيْ يَتَخَبَّطُهُ الشَّيْطٰنُ مِنَ الْمَسِّ.

Those who devour usury (interest) will not rise on the day of Resurrection except as the rising of a person whose senses the jinn has squandered by clinging (to him).[2]

يٰأَيُّهَا الَّذِيْنَ اٰمَنُوا اتَّقُوا اللهَ وَذَرُوْا مَا بَقِيَ مِنَ الرِّبٰوا إِنْ كُنْتُمْ مُّؤْمِنِيْنَ. فَإِنْ لَّمْ تَفْعَلُوْا فَأْذَنُوْا بِحَرْبٍ مِّنَ اللهِ وَرَسُوْلِهِ.

O believers! Fear Allah and forsake whatever usury that is outstanding if you have conviction in the order of Allāh. If you do not desist, prepare to fight Allāh and His Messenger.[3]

عن جابر رضي الله عنه قال: لعن رسول الله صلى الله عليه وسلم: آكل الربا وموكله، الخ. (رواه مسلم: ٢/٢٨، باب الربا، قديمى)

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[1] Sūrah al-Baqarah, 2: 275.

[2] Sūrah al-Baqarah, 2: 275.

[3] Sūrah al-Baqarah, 2: 278.

Rasūlullāh sallallāhu ‘alayhi wa sallam cursed the devourer of usury, the one who appoints another over it…

عن عبد الله بن مسعود رضي الله عنه عن النبي صلى الله عليه وسلم قال: الربا ثلاثة وسبعون باباً أيسرها مثل أن ينكح أمه، وإن أربى الربا عرض الرجل المسلم. (المستدرک للحاكم: ٤٨/٢، كتاب البيوع، دار ابن حزم)

Rasūlullāh sallallāhu ‘alayhi wa sallam said: Usury has seventy-three doors, the least of which is similar to committing adultery with one’s mother…

وأخرج ابن أبي حاتم في تفسيره (٥٥١/٢) والشافعي عن عمرو بن الأحوص أن رسول الله صلى الله عليه وسلم، قال: ألا إن كل رباً كان فى الجاہلية موضوع عنكم كله.

Rasūlullāh sallallāhu ‘alayhi wa sallam said: Every usury of jāhilī times has been unburdened from you.

Just as the texts which make reference to the prohibition of alcohol and adultery are absolute and general in nature – without differentiating between dār al-Islām and dār al-harb – the prohibition of usury ought to be the same.

2. When a harbī obtains sanctuary and enters a dār al-Islām, then just as his wealth is accepted as sacrosanct on the basis of the agreement which he made, and it is prohibited to collect usury from him, in the same when, when a Muslim obtains sanctuary to enter a dār al-harb, his wealth will become sacrosanct on the basis of the agreement which he made.

3. Hadrat Abū Bakr radiyallāhu ‘anhu had obtained a camel through a bet. When he brought the camel to Rasūlullāh sallallāhu ‘alayhi wa sallam, he instructed him to give it in charity.

فجاء به إلى رسول الله صلى الله عليه وسلم، قال: تصدق به. (تفسير ابن كثير، سورة الروم، بحواله ابن ابى حاتم)

In this incident, Rasūlullāh sallallāhu ʿalayhi wa sallam did not differentiate between a dār al-harb and dār al-Islām when he ordered him to give it in charity. Makkah was a dār al-harb at the time, while Hadrat Abū Bakr radiyallāhu ʿanhu was in Madīnah. The camel was sent to him in Madīnah.

4. Rasūlullāh sallallāhu ʿalayhi wa sallam had laid down a condition of goats in a wrestling match with Hadrat Rukānah radiyallāhu ʿanhu. When Rasūlullāh sallallāhu ʿalayhi wa sallam defeated him three times and he received the goats [for winning the match], he returned the goats to him. This, notwithstanding the fact that Hadrat Rukānah radiyallāhu ʿanhu was not a Muslim at the time.

فقام عنه ورد عليه غنمه. (الاصابة، تحت ذكر يزيد بن ركانة: ٥١٤/٦)

An overview of the proofs of those who permit usury in a dār al-harb

(1)

The first proof is a Hadīth which Mak-hūl relates from Rasūlullāh sallallāhu ʿalayhi wa sallam as a mursal Hadīth:

لا ربا بين المسلم والحربي في دار الحرب. (معرفة السنن والآثار: ٤٧/٧، بيروت)

Answer: This is a mursal Hadīth which the majority of scholars have rejected. Observe the following:

قال المحقق ابن همام في فتح القدير: وهذا الحديث غريب، ونقل ما روى مكحول عن النبي صلى الله عليه وسلم أنه قال: ذلك. قال الشافعي: قال أبو يوسف: إنما قال أبو حنيفة هذا لأن بعض المشيخة حدثنا عن مكحول عن رسول الله صلى الله عليه وسلم أنه قال: لا ربا بين أهل الحرب. أظنه قال: وأهل الإسلام. قال الشافعي: وهذا الحديث ليس بثابت ولا حجة فيه، أسنده عنه البيهقي... وهذا لا يفيد لمعارضة إطلاق النصوص إلا بعد ثبوت حجية حديث مكحول، وقد يقال: لو سلم حجيته فالزيادة بخبر الواحد لا تجوز. (فتح القدير: ٣٩/٧، باب الربا، دار الفكر)

Saʿdī Chalpī writes in the marginalia of the above:

أقول: قال ابن العز: قال فى المغنى: ہذا خبر مجہول لم يرو في صحيح ولا مسند ولا كتاب موثوق بہ، وہو مع ذلک مرسل. ويحتمل أن المراد بقولہ: لا ربا النہي عن الربا كقولہ تعالىٰ: فلا رفث ولا فسوق ولا جدال فى الحج. انتہى. وعلى تقدير صحتہ لا يصلح مقيداً للمطلقات مثل لا تأكل الربا، إذ لا يزاد بخبر الواحد على الكتاب. (حاشية فتح القدير: ٣٩/٧، دار الفكر)

وقال العلامة العيني: ہذا حديث غريب ليس لہ أصلى الله عليه وسلم. (البناية فى شرح الهداية: ١٦٥/٣)

وفي معرفة السنن والآثار: قال الأوزاعي: الربا عليہ حرام في دار الحرب وغيرہا... وقال أبو يوسف: القول ما قال الأوزاعي. وإنما أحل أبو حنيفة ہذا لأن بعض المشيخة حدثنا عن مكحول عن رسول الله صلى الله عليہ وسلم أنہ قال: لا ربا بين أہل الحرب أظنہ قال: وأہل الإسلام. قال الشافعي: القول كما قال الأوزاعي وأبو يوسف وما احتج بہ أبو يوسف لأبي حنيفة ليس بثابت ولا حجة فيہ. (معرفة السنن والآثار للامام البيہقى، ٤٧/٧، باب بيع الدرہم بالدرہمين فى ارض الحرب، كتاب السير، بيروت)

وكذا فى الأم للامام الشافعى: ٣٧٩/٤، بيع الدرہم بالدرہمين فى ارض الحرب، دار الفكر. وفى نصب الراية لأحاديث الهداية: ٤٤/٤)

وقال الإمام النووي: والجواب عن حديث مكحول أنہ مرسل ضعيف فلا حجة فيہ ولو صح لتأولناه على أن معناه لا يباح الربا في دار الحرب جمعاً بين الأدلة. (المجموع شرح المہذب: ٣٩٢/٩، باب الربا، دار الفكر)

وقال المحقق ابن قدامة الحنبلي: وخبرہم مرسل لا نعرف صحتہ ويحتمل أنہ أراد النہي عن ذلک، ولا يجوز ترک ما ورد بتحريمہ القرآن وتظافرت بہ السنة وانعقد الإجماع على تحريمہ بخبر مجہول لم يرد فى صحيح ولا مسند ولا

كتاب موثوق به وہو مع ذلک مرسل محتمل. (المغنى: ١٦٣/٤، باب الربا والصرف، بيروت)

وفي حاشية الروض المربع شرح زاد المستقنع: وما روي "ولاربا بين المسلم وأہل الحرب" خبرمجہول، لا يترک له تحريم ما دل عليه الكتاب والسنة. (حاشية الروض لعبد الرحمن الحنبلى، ص ١٣٩٢)

وفي مطالب أولى النہى: وحديث مكحول... رد بأنه خبر مجہول، لا تترک له تحريم ما دل عليه القرآن والسنة الصحيحة. (مطالب اولى النہى لمصطفى السيوطى الحنبلى: ١٨٩/٣، دمشق)

وفى الموسوعة الفقہية الكويتية: ذہب جمہور الفقہاء إلى أن الربا حرام في دار الحرب كحرمته في دار الإسلام، وقالوا: إن النصوص في تحريم الربا عامة، ولم يفرق بين دار ودار، ولا بين مسلم وغيره. (الموسوعة: ٢٠٨/٢٠، الربا فى دار الحرب)

(2)

Hadrat ʿAbbās radiyallāhu ʿanhu embraced Islam in the Battle of Badr or some time after it, but he did not emigrate to Madīnah. In 10 A.H. on the occasion of the Farewell Pilgrimage, Rasūlullāh sallallāhu ʿalayhi wa sallam announced:

ربا الجاہلية موضوع وأول ربا أضعه ربانا ربا عباس بن عبد المطلب رضي الله عنه فإنه موضوع كله. (رواه ابو داود: ٢٦٣/١، كتاب البيوع)

Thus, up to the Farewell Pilgrimage, Rasūlullāh sallallāhu ʿalayhi wa sallam did not prohibit the usurious transactions of Hadrat ʿAbbās radiyallāhu ʿanhu because Makkah was a dār al-harb, and it was permissible to collect usury from a harbī in dār al-harb.

Answer:

The ʿulamāʾ give several answers to this Hadīth.

1. Hadrat ʿAbbās radiyallāhu ʿanhu probably received specific permission for it.

2. Imām Subkī rahimahullāh says that there is no proof that Hadrat ʿAbbās radiyallāhu ʿanhu continued usurious transactions after embracing Islam. If he did, he probably did it due to ignorance. It is also possible that this Hadīth refers to outstanding usury owed by Hadrat ʿAbbās radiyallāhu ʿanhu before embracing Islam.
3. After the prohibition of usury, Hadrat ʿAbbās radiyallāhu ʿanhu may have given up ribā an-nasī'ah (interest on loans) and considered ribā al-fadl to be permissible.
4. It is possible that the prohibition of usury was not revealed until then. The verse referring to the absolute prohibition of usury was revealed after 9 A.H.

يٰأَيُّهَا الَّذِيْنَ اٰمَنُوا اتَّقُوا اللّٰهَ وَذَرُوْا مَا بَقِيَ مِنَ الرِّبٰوا إِنْ كُنْتُمْ مُّؤْمِنِيْنَ.

O believers! Fear Allah and forsake whatever usury that is outstanding if you have conviction in the order of Allāh.[1]

The above opinion is supported by two incidents:

1. The Banū Thaqīf tribe laid down certain conditions when it embraced Islam. One of the conditions was that they had outstanding usury amounts which they needed to collect. They will have the right to collect them. Rasūlullāh sallallāhu ʿalayhi wa sallam accepted this condition.

2. After the Conquest of Makkah, Rasūlullāh sallallāhu ʿalayhi wa sallam appointed Hadrat ʿAtāb ibn Usayd radiyallāhu ʿanhu as the governor of Makkah. At the time, the Banū Mughīrah had usury amounts which it was still owing to the Banū ʿAmr ibn ʿUmayr ibn ʿAuf. The Banū Mughīrah who had embraced Islam refused to pay. Hadrat ʿAtāb radiyallāhu ʿanhu wrote a letter to Rasūlullāh sallallāhu ʿalayhi wa sallam asking him about this matter. The following verse was revealed subsequently:

يٰأَيُّهَا الَّذِيْنَ اٰمَنُوا اتَّقُوا اللّٰهَ وَذَرُوْا مَا بَقِيَ مِنَ الرِّبٰوا إِنْ كُنْتُمْ مُّؤْمِنِيْنَ.

[1] Sūrah al-Baqarah, 2: 278.

> O believers! Fear Allah and forsake whatever usury that is outstanding if you have conviction in the order of Allāh.[1]

If we do not accept these explanations, then this incident itself will not be of any use to the view of the Hanafīs because Makkah had become a dār al-Islām in Ramadān 8 A.H. after the Conquest of Makkah. This would mean that Hadrat ʿAbbās radiyallāhu ʿanhu continued usurious transactions after the city became a dār al-Islām. Whereas this is unanimously considered to be harām.

The above explanations have been compiled by Dr. Nazdiyah Hammād (Jāmiʿah Umm al-Qurā, Makkah) in *Ahkām at-Taʿāmul bi ar-Ribā Bayna al-Muslimīn wa Ghayr al-Muslimīn*. The crux of the discussion has been quoted by Maulānā Khālid Sayfullāh Rahmānī Sāhib in *Jadīd Fiqhī Masā'il*, vol. 4, pp. 58-62.

(3)

The third proof of Imām Abū Hanīfah and Imām Muhammad rahimahumallāh is that the wealth of a harbī is not sacrosanct. The prohibition is applied to taking/collecting protected wealth. This is why usury can be taken from a harbī.

Answer:

Entering into a covenant or peace treaty is one of the causes of protection of wealth. This is an accepted principle of the jurists. Which is why it is not permissible to collect interest from a dhimmī living in a dār al-Islām. When a Muslim obtains security for himself and enters a dār al-harb, he has made a collective agreement with all the residents of the dār al-harb. This is why their wealth will also be sacrosanct with respect to him.

If usury were permitted, there is a strong possibility of the sanctity of the Sharīʿah limits gradually leaving the hearts of Muslims. This is such a major harm that this one reason alone is sufficient to classify it as unlawful. In the Hanafī madh-hab, the view of Imām Abū Yūsuf rahimahullāh on this issue is stronger, and more suited to our times. This is why the verdict is issued on his opinion. (Refer to *Jadīd Fiqhī Masā'il*, vol. 4, p. 62)

ʿAllāmah Shāmī rahimahullāh said that Imām Abū Yūsuf rahimahullāh had held the post of chief justice. Based on his extra experience, the

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[1] Sūrah al-Baqarah, 2: 278.

verdict will be issued on his opinions in matters related to transactions.

وكل فرع بالقضا تعلقاً – قول أبي يوسف فيه ينتقىٰ

وفى القنية من باب المفتي: الفتوىٰ على قول أبي يوسف فيما يتعلق بالقضاء لزيادة تجربته وكذا فى البزازية، من القضاء، أى لحصول زيادة العلم بتجربته ولهذا رجع أبو حنيفة عن القول بأن الصدقة أفضل من حج التطوع لما حج وعرف مشقته. (شرح عقود رسم المفتى، ص ٢٨، ٢٩)

Allāh taʽālā knows best.

The difference between dār al-Islām, dār al-harb and dār al-amn

Question

What is the difference between dār al-Islām, dār al-harb and dār al-amn? Is there a dār al-harb today? Can America and European countries be classified as dār al-harb?

Answer

Dār al-Islām: A country in which Muslims have the political authority to promulgate and apply all the injunctions of Islam.

Dār al-harb: A country belonging to non-Muslims where unbelievers enjoy peace and security while Muslim residents are deprived of peace and security. Furthermore, the Muslims are denied religious rights such as performing acts of worship, jumuʽah salāh, the two ʽīd salāhs, etc. openly.

Dār al-amn: A country which is ruled by non-Muslims but Muslims are free to practise their religion. They can invite towards Islam and practise those injunctions of Islam which do not require political rule and political authority.

In the light of the above definitions, it is difficult to classify present-day non-Muslim countries as dār al-harb. Therefore, most non-Muslim countries will fall under the classification of dār al-amn.

Further reading: *Qāmūs al-Fiqh*, vol. 3, pp. 395-399; *Jadīd Fiqhī Masā'il*, vol. 4, pp. 62-82; *al-Jihād Fī al-Islām* of Dr. Muhammad Saʽīd Ramadān al-Būtī, p. 80; *Ahsan al-Fatāwā*, vol. 3, p. 21; *Badā'iʽ as-Sanā'iʽ*, vol. 7, p. 130; *al-Fatāwā al-Hindīyyah*, vol. 2, p. 232; *Radd al-Muhtār*, vol. 4, p. 175.

Allāh taʽālā knows best.

Selling wheat in exchange for wheat flour

<u>Question</u>

A person has wheat or rice, and he needs wheat flour or rice flour. Can he give over the wheat/rice and take the same weight of wheat/rice flour? What arrangement can he make to fulfil this need?

<u>Answer</u>

If the wheat/rice flour is definitely more than the flour which is in the wheat/rice, and the exchange is done on the spot, it will be permissible and usury will not be realized. This is because when a measured or weighted item is exchanged for the same genus, it has to be equal and on the spot [cash]. If not, usury will take place. In such a case, the flour will be in exchange for flour, and the extra flour will be in exchange for the husk. Nowadays, husk is also classified as wealth because it is used as animal feed, for tanning and other purposes.

A <u>H</u>adīth states:

عن عبادة بن الصامت رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم: الذهب بالذهب، والفضة بالفضة، والبر بالبر، والشعير بالشعير، والتمر بالتمر، والملح بالملح، مثلاً بمثل، سواء بسواء، يداً بيدٍ، فإذا اختلفت هذه الأصناف، فبيعوا كيف شئتم إذا كان يداً بيدٍ. (رواه مسلم: ٢/٢٥، باب الربا)

<u>الهداية:</u>

ولا يجوز بيع الحنطة بالدقيق ولا بالسويق لأن المجانسة باقية من وجه... والمعيار فيهما الكيل لكن الكيل غيرمسوّ بينهما وبين الحنطة لاكتنازهما فيه وتخلخل حبات الحنطة فلا يجوز وإن كان كيلاً بكيل. (الهداية: ٣/٨٢، باب الربا)

We learn from the above text that the jurists prohibited this transaction because there cannot be equality in measure between wheat and flour. Imām Abū <u>H</u>anīfah and Imām Mu<u>h</u>ammad ra<u>h</u>imahumallāh are of the view that wheat will always be a measured item on the basis of textual evidence. Imām Abū Yūsuf ra<u>h</u>imahullāh is of the view that societal norms will be taken into consideration. The verdict is issued on the view of Imām Abū Yūsuf ra<u>h</u>imahullāh.

الكيل فى الشيء أو الوزن فيه ما كان في ذلك الوقت إلا لأن العادة إذ ذاك بذلك وقد تبدلت فتبدل الحكم... يصار إلى العرف الطاري بعد النص بناء على أن تغير العادة يستلزم تغير النص حتى لو كان صلى الله عليه وسلم حياً لنص عليه... (فتح القدير: ١٥/٧، باب الربا، دار الفكر. وكذا فى البناية: ١٥٢/٣)

وفى الدر المختار: وعن الثاني اعتبار العرف مطلقاً ورجحه الكمال وخرج عليه سعدي افندي استقراض الدراهم عدداً وبيع الدقيق وزناً يعني بمثله و فى الكافى الفتوىٰ على عادة الناس، بحر، وأقره المصنف. وفى الشامية: وملخصه: إن النص معلول بالعرف فيكون المعتبر هو العرف في أي زمن كان ولا يخفى أن هذا فيه تقوية لقول أبي يوسف فافهم. (الدر المختار مع فتاوى الشامى: ١٧٦/٥، ١٧٧، مطلب فى ان النص اقوىٰ من العرف، سعيد)

بدائع الصنائع:

وروي عن أبي يوسف أنه إذا غلب استعمال الوزن فيها تصير وزنية ويعتبر التساوى فيها بالوزن وإن كانت فى الأصل كيلية. (بدائع الصنائع: ١٩٤/٥، فصل فى شرائط جريان الربا، سعيد)

حاشية الطحطاوى:

وقد وجد فى الغياثية: عن أبي يوسف أنه يجوز استقراضه وزناً إذا تعارف الناس ذلك وعليه الفتوىٰ، انتهىٰ. (حاشية الطحطاوى على الدر المختار: ١٠٩/٣)

ʿAzīz al-Fatāwā:

Ibn Humām ra<u>h</u>imahullāh gave preference to this view. It is stated in *al-Kāfī:*

الفتوى على عادة الناس.[١]

Hadrat Maulānā Ashraf ʿAlī Thānwī rahimahullāh also classifies wheat as a weighted item:

If the same item is on both sides [the buyer and the seller], and the item is sold by weight, e.g. wheat in exchange for wheat...then it is obligatory for the weight to be the same.[2]

فتح القدير:

لأنهما أى السويق والدقيق من أجزاء الحنطة: وإنما لم يقل أجزاؤها لأن من أجزائها النخالة أيضاً. (فتح القدير: ٧/٢٢)

الهداية:

ولا يجوز بيع الزيتون بالزيت والسمسم بالشيرج حتى يكون الزيت والشيرج أكثر مما فى الزيتون والسمسم فيكون الدهن بمثله والزيادة بالثجير... ولو لم يعلم مقدار ما فيه لا يجوز لاحتمال الربا والشبهة فيه كالحقيقة. (الهداية: ٣/٨٥، باب الربا)

ʿItr Hidāyah:

Question: In what situation is it permissible to exchange wheat for wheat flour?

Answer: I am of the view that exchanging wheat for wheat flour is similar to exchanging mustard seeds for mustard oil. It will only be permissible if the flour is definitely more than the flour which is present in the wheat, and the transaction is a cash transaction.[3]

Further reading: *Muʿallim al-Fiqh* (Urdu translation of *Majmūʿah al-Fatāwā*), vol. 2, p. 128.

However, it could be difficult to ascertain whether the flour is more or less. In such a case, one could resort to the following stratagem:

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[1] *ʿAzīz al-Fatāwā*, vol. 1, p. 625.

[2] *Bahishtī Zewar*, p. 403.

[3] *ʿItr Hidāyah*, p. 408.

The person having the wheat must sell it in exchange for money. He may then buy wheat flour with that money. However, the second transaction must not be preconditioned by the first one.

Observe the following Hadīth from which permissibility is gauged:

إن رسول الله صلى الله عليه وسلم بعث أخا بني عدي الأنصاري فاستعمله على خيبر فقدم بتمر جنيب، فقال له رسول الله صلى الله عليه وسلم: أكل تمر خيبر هكذا؟ قال: لا، والله يا رسول الله! إنا لنشترى الصاع بالصاعين من الجمع، فقال رسول الله صلى الله عليه وسلم: لا تفعلوا، ولكن مثلاً بمثل أو بيعوا هذا واشتروا بثمنه من هذا، وكذلك الميزان. (رواه مسلم: باب بيع الربا: ٢/٢٦)

'Itr Hidāyah:

A lawful stratagem would be to first sell the mustard seeds for cash money. Thereafter, the money which the person received may be used to buy mustard oil from the same seller either for cash or on credit. When these two transactions are conducted consecutively in the same assembly – by a mere offer and acceptance – the objective of obtaining the mustard oil in exchange for the mustard seeds will be realized. However, this objective will only be realized correctly if the second transaction is not preconditioned by the first. Furthermore, both transactions must be concluded by mutual agreement of the buyer and seller. If the first transaction is conducted on condition that the second one will also be conducted, or if either of the transaction is conducted under compulsion or out of fellow-feeling, then it will not be permissible.[1]

ما احتال به المسلم حتى يتخلص به من الحرام أو يتوصل به إلى الحلال فلا بأس به، وما احتال به حتى يبطل حقاً أو يحق باطلاً أو ليدخل به شبهة في حق فهو مكروه. (فتح البارى: ٣٣١/١٢. وكذا فى المبسوط للامام السرخسى: ٣٧٣/٣٠، كتاب الحيل، دار الفكر)

Allāh taʿālā knows best.

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[1] *'Itr Hidāyah*, p. 407.

Selling mustard seeds in exchange for mustard oil

Question

Mustard grows profusely in our area. Some people take one kilo of mustard seeds to a shopkeeper and obtain half a kilo mustard oil in return. A scholar said that for this transaction to be valid, it will be necessary for the oil which is contained in the mustard seeds to be more than the mustard seed oil. In most cases, the oil of the shopkeeper is less than what is contained in the mustard seeds. After all, the shopkeeper also takes into consideration the effort and cost of extracting the oil from the seeds. Is there any way that this transaction can be lawful?

Answer

To make this transaction lawful, the buyer [of the oil] must sell his mustard seeds for cash. He may then buy the mustard oil with that money. This stratagem will make the transaction doubtless and valid.

عن سعيد بن المسيب أن أبا سعيد الخدري رضي الله عنه وأبا هريرة رضي الله عنه حدثاه: أن رسول الله صلى الله عليه وسلم بعث سواد بن غزية رضي الله عنه وأمره على خيبر، فقدم عليه بتمر جنيب يعني الطيب، فقال رسول الله صلى الله عليه وسلم: أكل تمر خيبرهكذا؟ قال: لا، والله يارسول الله! إنا نشترى الصاع بالصاعين والصاعين بالثلاثة من الجمع، فقال رسول الله صلى الله عليه وسلم: لا تفعل، ولكن بع هذا واشتر بثمنه هذا، وكذلك الميزان. أخرجه الشيخان. (نصب الراية: ٣٦/٤، باب الربا. رواه البخارى فى باب اذا أراد بيع تمر بتمر خير منه، ٢٩٣/١. ومسلم: ٢٦/٢، باب الربا)

التعليق الممجد:

قوله عليه السلام: لا تفعل بع تمرك بالدراهم ثم اشتر بالدراهم جنيباً، وقال: فى الميزان مثل ذلک، أى قال: ما يوزن إذا احتيج إلى بيع بعضه ببعض مثل ذلک القول الذي قال فى التمر المكيل أى يباع غير الجيد الموزون بثمن ثم يشتري به موزون جيد... قوله بع تمرک الخ أشار إليه بما يجتنب به عن الربا

مع حصول المقصود، وبہ احتج جماعة من فقهائنا وغيرہم على جواز الحيلة فى الربا وبنوا عليها فروعاً. (التعليق الممجد: على ہامش المؤطا للامام محمد، ص ٣٥٤، قديمى كتب خانہ)

وكذا فى مرقات المفاتيح: (٦/٦٢، ٦٣)

تكملة فتح الملہم:

إن الحيلة كلما أوجبت إبطال حكمة شرعية لا تقبل، كحيلة سقوط الزكاة وسقوط الاستبراء، وأما إذا توصل بها الرجل إلى ما يجوز فعلہ ودفع المكروه بها عن نفسہ وعن غيره فلا بأس بها... واستدل على جواز الحيلة المشروعة بقولہ تعالىٰ: "وخذ بيدک ضغثاً فاضرب بہ ولا تحنث." (سورة صٓ، الآية: ٤٤). فإن ذلک تعليم حيلة، وبقولہ تعالىٰ: "فلما جہزہم بجہازہم جعل السقاية في رحل أخيہ." (سورة يوسف، الآية: ٧٠). فإنہ حيلة... قال العبد الضعيف عفا الله عنہ: ومن أقوى ما يدل على جواز الحيلة المشروعة ما أخرجہ الشيخان والنسائي عن أبي سعيد رضي الله عنه وأبي ہريرة رضي الله عنه أن رسول الله صلى الله عليہ وسلم استعمل رجلاً على خيبر... وإنما ہو تعليم حيلة للتوصل إلى طريق حلال، فما كان من ہذا القبيل فہو جائز قطعاً. (تكملة فتح الملہم: ١/٥٦٥)

المبسوط:

فالحاصل أن ما يتخلص بہ الرجل من الحرام أو يتوصل بہ إلى الحلال من الحيل فہو حسن، وإنما يكره ذلک أن يحتال في حق الرجل حتى يبطلہ أو في باطل حتى يموہہ أو في حق الرجل حتى يدخل فيہ شبہة، فما كان على ہذا السبيل فہو مكروه، وما كان على السبيل الذي قلنا أولاً فلا بأس بہ... أن المفتي إذا بين جواب ما سئل عنہ فلا بأس أن يبين للسائل الطريق الذي

يحصل به مقصود مع التحرز عن الحرام، ولا يكون هذا مما هو مذموم من تعليم الحيل، بل هو اقتداء برسول الله صلى الله عليه وسلم حيث، قال لعامل خيبر: هلا بعت تمرک بسلعة ثم اشتريت بسلعتک هذا التمر. (المبسوط للامام السرخسی: ۲۰۹/۳۰)

ʿIṯr Hidāyah:

A lawful stratagem would be to first sell the mustard seeds for cash money. Thereafter, the money which the person received may be used to buy mustard oil from the same seller either for cash or on credit. When these two transactions are conducted consecutively in the same assembly – by a mere offer and acceptance – the objective of obtaining the mustard oil in exchange for the mustard seeds will be realized. However, this objective will only be realized correctly if the second transaction is not preconditioned by the first. Furthermore, both transactions must be concluded by mutual agreement of the buyer and seller. If the first transaction is conducted on condition that the second one will also be conducted, or if either of the transaction is conducted under compulsion or out of fellow-feeling, then it will not be permissible.[1]

Allāh taʿālā knows best.

Buying a house through a bond

Question

Is it permissible to buy a house through a bond?

Answer

A bond is defined as follows in *Encyclopaedia Britannica*:

A loan contract issued by local, state and national governments, and by private corporations specifying an obligation to return borrowed funds. The borrower promises to pay interest on the debt when due (usually semi-annually) at a stipulated percentage of the face value of the bond.

From the above definition we learn that a bond agreement is a usurious transaction. Usury is included among the destructive sins.

[1] *ʿIṯr Hidāyah*, p. 407.

Taking an interest-bearing loan without a severe need is not permitted.

Jadīd Fiqhī Masā'il:

It is a sin to pay or receive interest. Thus, as a principle, it is obviously unlawful to take an interest-bearing loan. Nonetheless, there are times when it becomes necessary to take such a loan. It becomes unavoidable to take such a loan when doing business, farming, trading, etc. In such situations, it will be permissible to take an interest-bearing loan, but only to the extent of necessity. This permission will only be granted when a person is so compelled that if he were not to take it, he will not be able to earn a living; and he will not be able to fulfil his basic necessities of food, clothing and shelter. It should not be for the sake of living in luxury, desiring comfort and raising one's financial position.[1]

'Allāmah Ibn Nujaym Misrī rahimahullāh writes:

وفى القنية، والبغية: يجوز للمحتاج الاستقراض بالربح. (الاشباه والنظائر: ٢٦٧/١)

'Allāmah Hamawī rahimahullāh explains the above as follows:

وذلك نحوه أن يقترض عشرة دنانير مثلاً و يجعل لربها شيئاً معلوماً في كل يوم ربحاً. (حاشية الحموى على الاشباه: ٢٦٧/١، القاعدة الخامسة الضرر يزال)

وفي الفقه الحنفي في ثوبه الجديد: وعن جابر بن عبد الله رضي الله عنه، لعن رسول الله صلى الله عليه وسلم آكل الربا ومؤكله وكاتبه وشاهده، وقال: هم سواء. ولايحل إلا عند الضرورة الملجئة، استناداً للقاعدة الفقهية [الضرورات تبيح المحظورات] التي استمدت حجيتها من الآية الكريمة: "إنما حرم عليكم الميتة والدم ولحم الخنزير... فمن اضطر غير باغ ولا عاد فلا إثم عليه." [البقرة : ١٧٣] فمن ألجأته الضرورة إلى الأكل من هذه المحرمات فيباح له ذلك بشرط أن يأكل منها غير قاصد التلذذ، ولا يتعدى في مقدار ما يأكل

[1] *Jadīd Fiqhī Masā'il*, vol. 1, p. 248.

حد الضرورة، بل يقصد دفع الضرورة وحفظ الحياة، فالضرورات تقدر بقدرها،... وبهذا الحكم أيضاً ينسحب على الربا، فهو محظور لا يحل إلا في حال الضرورة الملجئة. (الفقه الحنفى فى ثوبه الجديد: ٢٥٠/٤، انواع الربا، الضرورات تبيح المحظورات)

We learn from the above texts that an interest-bearing loan is only permitted in extreme situations of necessity. This is a time when even the unlawful becomes lawful. It is not permitted in normal situations.

<u>The levels of darūrah and hājah</u>

ʿAllāmah Hamawī rahimahullāh writes with reference to darūrah and hājah:

بهنا خمسة مراتب: ضرورة وحاجة ومنفعة وزينة وفضول.

فالضرورة: بلوغه حداً إن لم يتناول الممنوع، هلك أو قارب، وبهذا يبيح تناول الحرام.

والحاجة: كالجائع الذي لو لم يجد ما يأ كله لم يهلك غير أنه يكون في جهد ومشقة، وبهذا لا يبيح الحرام، ويبيح الفطر فى الصوم.

والمنفعة: كالذي يشتهي خبز البر ولحم الغنم والطعام الدسم.

والزينة: كالمشتهي بحلوى والسكر.

والفضول: التوسع بأكل الحرام والشبهة. (حاشية الاشباه والنظائر: ٢٥٢/١، القاعدة الخامسة: الضرر يزال)

(مثله فى المقالات الفقهية، ص ٣٢٠، الضرورة والحاجة المرخصة، مكتبة دار العلوم كراتشى)

The issue under question most probably does not reach such a level whereby if a person does not buy a house on loan, he will die. This is because becoming a home-owner is not included among essential needs. Rather, a person can make do with renting a house. Yes, there

are times when the need is so overriding, that there is the fear of severe harm or difficulty. In such a situation, the jurists applied the principle of a need being on the level of a severe necessity.

الحاجة تنزل منزلة الضرورة عامة كانت أو خاصة ولهذا جوزت الإجارة على خلاف القياس للحاجة... وفى القنية، والبغية: يجوز للمحتاج الاستقراض بالربح. (الاشباه والنظائر: ١/٢٦٧)

Identifying a severe need and hardship will depend on situations, individuals and different regions. The same criterion will not be applied to every person and every region. Another point to remember is that the Qur'ān and Ahādīth contain severe warnings against usurious transactions. An interest-bearing loan is also economically detrimental because – in most cases – a person cannot free himself from such loans; he is always caught in the web of interest-bearing loans.

Fatāwā Mahmūdīyyah:

It is harām to pay or receive interest. If there is no alternative, a needy person may take an interest-bearing loan provided it is only to the extent of necessity.[1]

It is harām to pay interest. The Hadīth curses such a person. Committing a harām is pardoned only when it is done when a person is compelled. If there is an overriding danger to one's life or dignity – and there is no way of saving one's self from it, e.g. neither can one sell one's belongings nor can he obtain money without interest – then in such a situation, a person is classified as excused by the Sharī'ah. If he is not faced with such a need - but it is for a business need, he can obtain money without interest, or he can sell his belongings – then it will be unlawful to take an interest-bearing loan. It is a major sin.[2]

Question: What overriding need is there which makes an interest-bearing loan permissible?

Answer: When a person is faced with an unbearable compelling reason, then it is hoped that he will not be committing a sin by accepting usury. The same rule is applicable to all prohibitions.[3]

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[1] *Fatāwā Mahmūdīyyah*, vol. 16, p. 302.

[2] *Fatāwā Mahmūdīyyah*, vol. 16, pp. 305-306.

[3] *Fatāwā Mahmūdīyyah*, vol. 16, p. 375.

The following is quoted in the annotations to *Fatāwā Mahmūdīyyah:*

وإذا كان لإنسان حاجة أو ضرورة ملحة اقتضت معطى الفائدة أن يلجأ إلى هذا الأمر فإن الإثم في هذا الحال يكون على آخذ الربا، (الفائدة) وحده، وهذا بشرط أن تكون هناك حاجة أو ضرورة حقة لا مجرد توسع فى الكماليات أو أمور يستغنى عنها. (الحلال والحرام فى الاسلام ليوسف القرضاوى، ص ٢١٩، بيروت)

Further reading: *Nizām al-Fatāwā*, vol. 1, p. 186; *Fatāwā Rahīmīyyah*, vol. 9, p. 237; *Kitāb al-Fatāwā*, vol. 5, p. 320.

Allāh ta'ālā knows best.

Transacting with a person who has interest money

Question

A person has clearly-identifiable interest money. Can we transact with him in any way? Can we accept this money as payment for a debt which he owes us? Is there a difference in ruling between a Muslim and a non-Muslim?

Answer

If you know with certainty that a certain amount of money belonging to a Muslim is harām, then it is unlawful to sell him anything in return for that money. Where it is not known with certainty, it will be permissible. If an unbeliever has interest money, it will be permissible to receive it as payment of a debt as long as he does not commit rationally impermissible and rationally detestable actions such as cheating, stealing, robbing, etc.

Imdād al-Ahkām:

Although unbelievers are addressed in subsidiary matters related to transactions and punishments, the general address is insufficient to apply the rule of impermissibility and invalidity. Rather, adherence is also a precondition. Those who are classified as harbī, do not adhere at all to Islamic injunctions – neither in compliance to their beliefs nor in opposition to them. Therefore, no matter how they earn their money – whether through usury, unlawful seizure, baseless and invalid transactions, in compliance with or opposition to their religion – it

will be included in their ownership. A Muslim is permitted to accept their money as a wage.[1]

الفتاوى الهندية:

ولو كان لمسلم على نصراني دين، فباع النصراني خمراً أخذ بثمنها وقضاه المسلم من دينه، جاز له أخذه، لأن بيعه له مباح، ولو كان الدين لمسلم على مسلم فباع المسلم خمراً وأخذ ثمنها وقضاه صاحب الدين، كره له أن يقبض ذلك من دينه، كذا فى السراج الوهاج. (الفتاوى الهندية: ٣٦٧/٥، كتاب الكراهية، باب فى القرض والدين)

تكملة البحر الرائق:

وكره لرب الدين أخذ ثمن خمر باعها مسلم لا كافر، يعني إذا كان لشخص مسلم دين على مسلم فباع الذي عليه الدين خمراً وأخذ ثمنها وقضى الدين لا يحل للمدين أن يأخذ ذلك بدينه وإن كان البائع كافراً جاز له أن يأخذ والفرق أن البيع فى الوجه الأول باطل فلم يملك البائع الثمن وهو باقٍ على ملك المشتري فلا يحل له أن يأخذ مال الغير بغير رضاه والبيع فى الوجه الثاني صحيح فملك البائع الثمن لأن الخمر مال متقوم في حق الكافر فجاز له الأخذ بخلاف المسلم. (تكملة البحر الرائق: ٢٠١/٨، كوئته)

وللاستزادة انظر: (فتاوى الشامى: ٣٨٥/٦، فصل فى البيع، سعيد. وتبيين الحقائق: ٤٦٨/٧، كتاب الكراهية)

Fatāwā Mahmūdīyyah:

If it is known with certainty that a certain amount of money is harām, then it is impermissible to sell anything in return for that money. Where it is not known with certainty, it will be permissible.[2]

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[1] *Imdād al-Ahkām*, vol. 4, p. 390.

[2] *Fatāwā Mahmūdīyyah*, vol. 11, p. 273; *Jawāhir al-Fatāwā*, vol. 2, p. 294.

Further reading: *Imdād al-Ahkām*, vol. 4, pp. 386-390; *Muntakhabāt Nizām al-Fatāwā*, p. 467.

Allāh ta'ālā knows best.

Transacting with a company involved in usurious transactions

Question

A person buys a machine through a certain company. As long as he does not pay the money to it, the company collects a rental from him for the machine. However, the company engages in a usurious transaction with a bank. It takes interest-bearing loans from the bank and buys the machines. It then pays interest on the borrowed amount. Is it permissible to buy the machine from this company? The buyer does not pay any interest; it is an independent transaction between himself and the company.

Answer

If Zayd bought a machine for R100 000 through a company, and the company will now collect R120 000 in instalments from him, then this will be interest even if the company refers to it as rental. If the company bought the machine for R100 000 and sold it to Zayd for R120 000 as a deferred payment, it will be classified as murābahah and this transaction will be permissible.

If the machine will remain in the ownership of the company and Zayd is to pay a specified monthly rental for it, and he will return the machine after a specified time, or the company sells it to him at a lesser amount, or gives it to him for free; then this will also be permissible.

As for the usurious transactions of the company [with the bank], that is its own actions; it will not affect the buyer's transaction. Non-Muslim companies in non-Muslim countries purchase machines on interest. We cannot impose Islamic injunctions on them because there is no Islamic government there. Furthermore, a Muslim is not directly linked to the usurious transactions and he has nothing to do with them. It will therefore be permissible to transact with such a company.

Allāh ta'ālā knows best.

Transacting with a bank

Question

A man conducted certain capital transactions with a bank. As per its rules, the bank then charged him interest. Will this interest be

classified as a debt? When the issue of paying zakāh comes up, will the interest be deducted from the amount?

<u>Answer</u>

The Sharī'ah prohibits usurious transactions. In the same way, usurious transactions with a bank are also prohibited and haram. It is essential for every Muslim male and female to abstain from them. The Qur'ān and Ahādīth contain severe warnings against those who involve themselves in usurious transactions. A person should repent from the depths of his heart over such a transaction.

Nonetheless, if, due to necessity; compulsion; error or flagrant sinning, a person becomes liable to pay interest on account of a transaction with a bank, then the jurists say that interest which is unjustly collected from a person is included as a debt. Therefore, the above-mentioned interest-bearing loans can be included as debts. However, since most bank loans are paid in instalments, the entire amount will not be deducted from the zakātable amount. Rather, only the instalments for that year will be deducted, and zakāh will be paid on the balance. Further details in this regard can be found in volume three in the chapter on zakāh.

<u>فتاوى الشامى:</u>

وكذا النوائب ولو بغير حق كجنايات زماننا فإنها فى المطالبة كالديون بل فوقها، حتى لو أخذت من الأكار فله الرجوع على مالك الأرض وعليه الفتوىٰ. وفى الشامية: وإن أريد بها ما ليس بحق كالجنايات المؤظفة على الناس في زماننا ببلاد فارس على الخياط والصباغ وغيرهم للسلطان في كل يوم أو شهر فإنها ظلم فاختلف المشايخ في صحة الكفالة بها فقيل تصح إذ العبرة في صحة الكفالة وجود المطالبة إما بحق أو باطل. (فتاوى الشامى: ٣٣٠/٥، سعيد)

<u>الفتاوى الهندية:</u>

وأما النوائب فإن أريد بها ما ليس بحق... فإنها ظلم اختلف المشايخ في صحة الكفالة بها كذا في فتح القدير، والفتوىٰ على الصحة كذا في شرح الوقاية وممن يميل إلى الصحة الشيخ الإمام البزدوي كذا فى الهداية وقال النسفي

وشمس الأئمة وقاضيخان مثل قول فخر الإسلام لأنها في حق توجه المطالبة فوق سائر الديون. (الفتاوى الهندية: ٢٩١/٣)

وللاستزادة انظر: (شرح العناية على هامش فتح القدير: ٢٢٢/٧. وفتح القدير: ٢٢٣/٧، دار الفكر)

وفي رد المحتار: الدين ما وجب فى الذمة بعقد أو استهلاك وما صار في ذمته ديناً باستقراضه فهو أعم من القرض كذا فى الكفاية. (رد المحتار: ١٥٧/٥، سعيد)

Allāh taʿālā knows best.

Exchanging steel utensils

<u>Question</u>

Some people take their old steel utensils to a shopkeeper and exchange them for new ones. The shopkeeper does not weigh the old utensils. Instead, he asks the person to give over the old utensils together with a certain amount of money. The person may then take the new utensils. Is this permissible?

<u>Answer</u>

Steels is included among weighed items in which usury takes place. Therefore, when buying or selling it, there has to be equality on both sides. If both are the same in weight, it will not be permissible to demand an additional amount of money from the other side. Yes, the person may sell his old utensils for cash money. He may then use that money together with an additional amount of money to buy the new utensils. This transaction will be permissible.

عن عبادة بن الصامت رضي الله عنه، عن النبي صلى الله عليه وسلم قال: الذهب بالذهب مثلاً بمثل والفضة بالفضة مثلاً بمثل والتمر بالتمر مثلاً بمثل والبر بالبر مثلاً بمثل والملح بالملح مثلاً بمثل والشعير بالشعير مثلاً بمثل فمن زاد أو ازداد فقد أربى بيعوا الذهب بالفضة كيف شئتم يداً بيدٍ. (رواه الترمذى: ٢٣٥/١، ابواب البيوع)

الهداية:

ولا يجوز بيع الجيد بالردي مما فيه الربا إلا مثلاً بمثل لإہدار التفاوت فی الوصف ...وإذا عدم الوصفان الجنس والمعنى المضموم إليه حل التفاضل والنسا لعدم العلة المحرمة والأصل فيه الإباحة. (الهداية: ۷۹/۳، باب الربا)

نصب الراية:

عن سعيد بن المسيب أن أبا سعيد الخدري رضي الله عنه وأبا ہريرة رضي الله عنه حدثاه: أن رسول الله صلى الله عليه وسلم بعث سواد بن غزية رضي الله عنه وأمره على خيبر، فقدم عليه بتمر جنيب يعني الطيب، فقال رسول الله صلى الله عليه وسلم: أكل تمر خيبرہكذا؟ قال: لا، والله يارسول الله! إنا نشترى الصاع بالصاعين والصاعين بالثلاثة من الجمع، فقال رسول الله صلى الله عليه وسلم: لا تفعل، ولكن بع ہذا واشتر بثمنه ہذا، وكذلك الميزان. أخرجه الشيخان. (نصب الراية: ٣٦/٤، باب الربا. رواه البخارى فى باب اذا أراد بيع تمر بتمر خير منه، ۲۹۳/۱. ومسلم: ۲٦/۲، باب الربا)

التعليق الممجد:

قوله عليه السلام: لا تفعل بع تمرک بالدراہم ثم اشتر بالدراہم جنيباً، وقال: فى الميزان مثل ذلک، أى قال: ما يوزن إذا احتيج إلى بيع بعضه ببعض مثل ذلک القول الذي قال فى التمر المكيل أى يباع غير الجيد الموزون بثمن ثم يشتري به موزون جيد... قوله بع تمرک الخ أشار إليه بما يجتنب به عن الربا مع حصول المقصود، وبه احتج جماعة من فقہائنا وغيرہم على جواز الحيلة فى الربا وبنوا عليها فروعاً. (التعليق الممجد: على ہامش المؤطا للامام محمد، ص ٣٥٤، قديمى كتب خانه)

المبسوط:

فالحاصل أن ما يتخلص به الرجل من الحرام أو يتوصل به إلى الحلال من الحيل فهو حسن، وإنما يكره ذلك أن يحتال في حق الرجل حتى يبطله أو في باطل حتى يموهه أو في حق الرجل حتى يدخل فيه شبهة، فما كان على هذا السبيل فهو مكروه، وما كان على السبيل الذي قلنا أولاً فلا بأس به. (المبسوط للامام السرخسى: ٢٠٩/٣٠)

Allāh ta'ālā knows best.

Depositing money in a bank

Question

Some people are occupied in welfare and charitable works. Because they do not have sufficient money, they deposit their money in a bank and receive interest on it. They do this so that the money may increase. Sometimes, they transfer monies from one bank to another to acquire additional interest. Is it permissible to do this?

Answer

Carrying out welfare and charitable works is commendable. We must do as much as possible in benefiting Allāh's creation. However, it is harām to deposit money in a bank with the intention of receiving interest. How can it be correct to commit a harām action for the sake of a mustahab action?! It is even worse to transfer money from one bank to another with the express intention of receiving more interest. Whatever interest has been received must be given to the poor without the intention of rewards. The person must abstain from doing this in the future and repent. Yes, it is permissible to deposit money in a bank with the intention of safe-keeping. Even then, one has to be cautious.

Nizām al-Fatāwā:

It is permissible to deposit money in a bank with the intention of safe-keeping. Interest which is received should then be spent on those who are deserving, those immersed in debt and Muslims who are in dire situations.[1]

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[1] *Muntakhabāt Nizām al-Fatāwā*, vol. 1, p. 188.

The first point to bear in mind is that if a person deposits money in a bank for safe-keeping or for any other compelling reason, he must try to deposit it in an account which does not earn interest.[1]

Fatāwā Rahīmīyyah:

Question: There is a committee which is in the service of Muslims in general. It has deposited some money in the current account of a bank. It does not receive interest from it. However, the committee members want to deposit it in a savings account so that it may receive interest which it will then spend on afflicted Muslims. Is this proposal of the committee members permitted by the Sharī'ah? Is it permissible to spend the interest-money which it receives on Muslims?

Answer: Money can be deposited in a bank for safe-keeping or because of legal requirements. It is not permissible to deposit it with the intention of receiving interest even if the intention is to give the interest money to the poor...It is not permissible to deposit money in a bank with the intention of receiving interest and spending it on the poor.[2]

Further reading: *Kitāb al-Fatāwā*, vol. 5, p. 330.

Allāh ta'ālā knows best.

Taking possession of usurious items in an assembly

Question

Zayd went to a shopkeeper who gave him one kilo of wheat in exchange for one kilo of rice. The shopkeeper weighed the rice, but before he could weigh the wheat, someone called Zayd. He left and returned after ten minutes. In other words, the assembly changed. Is this transaction permissible?

Answer

If the shopkeeper weighed the rice in Zayd's presence, and then Zayd left and came back and took possession of the rice, the transaction is valid. If the shopkeeper did not weigh the rice as yet, then Zayd's departure caused the first transaction to be terminated. They will have to restart the entire transaction.

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[1] Ibid. p. 190.

[2] *Fatāwā Rahīmīyyah*, vol. 9, p. 270.

الهداية:

وما سواه أى ما سوى عقد الصرف مما فيه الربا من بيع الأموال الربوية بجنسها أو بخلاف الجنس يعتبر فيه التعيين ولا يعتبر فيه التقابض، فلو افترقا بعد تعيين البدلين عن غير قبض جاز عندنا. (الهداية، مع فتح القدير: ١٨/٧، باب الربا، دار الفكر)

رد المحتار:

والمعتبر تعيين الربوى في غير الصرف لأن غير الصرف يتعين بالتعيين ويتمكن من التصرف فيه، فلا يشترط قبضه كالثياب أى إذا بيع ثوب بثوب بخلاف الصرف، لأن القبض شرط فيه للتعيين، فإنه لا يتعين بدون القبض كذا فى الاختيار. (رد المحتار: ١٧٨/٥، باب الربا، سعيد)

Ahsan al-Fatāwā:

When transacting in measured and weighed items, if the species is the same or the amount is the same, then it is harām to defer it. However, it is not a prerequisite to take possession in that assembly; specifying it in the assembly will suffice.[1]

Allāh taʿālā knows best.

Usury which is less than the minimum Sharī'ah-approved amount

Question

The books of jurisprudence state that if a person engages in a usurious transaction which amounts to less than half sāʿ, then it is permissible. For example, a person gives a handful of wheat-flour and takes two handfuls in return; then this is permissible. Is this the verdict? Is it permissible to do this?

[1] *Ahsan al-Fatāwā*, vol. 7, p. 13.

Answer

The Imāms differ on the issue of usury being realized when there is a mutual exchange of items of the same genus when they are less than half sāʿ.

1. Imām Abū Hanīfah and Imām Abū Yūsuf rahimahumallāh are of the view that usury will not be realized in the above scenario. The reason is that for usury to be realized, there has to be an amount – measurement or weight; and the minimum weight specified by the Sharīʿah is half a sāʿ; and this is not found here.

2. Imām Mālik, Imām Shāfiʿī, Imām Ahmad ibn Hambal and Imām Muhammad rahimahumullāh are of the view that usury is realized here as well; so this transaction will be unlawful.

In the Hanafī madh-hab, the fatwā is issued on the verdict of Imām Muhammad rahimahullāh. The latter day jurists give preference to the view of Imām Muhammad rahimahullāh for the following reasons:

a) Ibn Humām rahimahullāh states that the view of Imām Muhammad rahimahullāh is the preferred view. ʿAllāmah Shāmī rahimahullāh gives preference to it. Other scholars such as the author of *al-Bahr ar-Rā'iq*, the author of *an-Nahr al-Fā'iq*, ʿAllāmah Sharanbulālī and Maqdisī issued their verdicts on the view of Imām Muhammad rahimahullāh.

b) The amounts which are less than half sāʿ are well-known and they are in use in many regions. To say that it is permissible for differences in the amounts could certainly lead to harm and corruption. This is especially so in our times when there are instruments and scales for weighing.

c) Monetary responsibilities (e.g. kaffārah, sadaqah al-fitr, etc.) where less than half sāʿ is specified does not mean that absolute differences in usurious items be classified as useless and futile. This is especially since the prohibition of it is known with certainty.

d) If the buying of one handful in exchange for two handfuls is not classified as usury, people – due to the moral degeneration of the times – will make this a means for making usury lawful in large amounts of wealth.

فتح القدير:

وفي جمع التفاريق، قيل: لا رواية فى الحفنة بفقيز واللب بالجوز، والصحيح ثبوت الربا، ولا يسكن الخاطر إلى ہذا بل يجب بعد التعليل بالقصد إلى صيانة أموال الناس تحريم التفاحة بالتفاحتين والحفنة بالحفنتين، أما إن كانت مكاييل أصغر منها كما في ديارنا من وضع ربع القدح وثمن القدح المصري فلا شك، وكون الشرع لم يقدر بعض المقدرات الشرعية فى الواجبات المالية كالكفارات وصدقة الفطر بأقل منہ لا يستلزم إہدار التفاوت المتيقن، بل لا يحل بعد تيقن التفاضل مع تيقن تحريم إہداره، ولقد أعجب غاية العجب من كلامہم ہذا، وروى المعلى عن محمد أنہ كره التمرة بالتمرتين، وقال: كل شيء حرم فى الكثير فالقليل منہ حرام. (فتح القدير: ٩/٧، دار الفكر)

وہكذا فى البحر الرائق: ١٣٠/٦، كوئٹہ. ورد المحتار: ١٧٦/٥، سعيد. والنہرالفائق: ٤٧٥/٣. والشرنبلالية: ١٨٧/٢. وحاشية الشلبى على التبيين: ٩٠/٤، ملتان. وحاشية الطحطاوى على الدر المختار: ١٠٩/٣، كوئٹہ)

فتح المعين:

تتمة: ما سبق من أن أدنى ما يكون مال الربا نصف صاع ليس متفقاً عليہ... ثم قال: ويجوز بيع الحفنة بالحفنتين خلافاً للشافعي ومحمد ...فعلى ما ذكره الكمال من أن الفضل المتيقن حرام وإن لم يدخل تحت أدنى الكيل الذي ورد الشرع بہ وہو نصف صاع ...ومن ہنا يعلم ثبوت الحرمة بالطريق الأولىٰ فيما إذا اتخذ بيع الحفنة بالحفنتين وسيلة إلى بيع نحو الكر بالكرين. (فتح المعين لابى السعود على شرح الكنز لملا مسكين: ٦٠٢/٢)

<u>فتح باب العناية فى شرح النقاية:</u>

(وجاز بيع حفنة بحفنتين) وعند مالك والشافعي وأحمد لا يجوز ذلك إلا في رواية عن مالك، ورواية عن أحمد وروى المعلى عن محمد أنه كره التمرة بالتمرتين وقال: كل شيء حرم فى الكثير فالقليل منه حرام، وإلى هذه الرواية مال بعض المحققين. (فتح باب العناية فى شرح النقاية: ٣/٢٦٢)

Allāh ta'ālā knows best.

Selling one apple in exchange for two

<u>Question</u>

In the area where we live, apples are sold by count [and not by weight]. Is it permissible to exchange two apples for one apple – because the quality of the one is superior? Bear in mind that apples in this region are sold by count.

<u>Answer</u>

It ought to be permissible as per juristical law because an apple is neither measured nor weighed. However, we learn that this is impermissible as per the text of Ibn Humām rahimahullāh. One should therefore abstain, especially in our times where apples are mostly sold by weight.

ولا يسكن الخاطر إلى هذا بل يجب بعد التعليل بالقصد إلى صيانة أموال الناس تحريم التفاحة بالتفاحتين. (فتح القدير: ٩/٧، دار الفكر)

وهكذا فى البحر الرائق: ٦/١٣٠، كوئته. ورد المحتار: ٥/١٧٦، سعيد. والنهر الفائق: ٣/٤٧٥. والشرنبلالية: ٢/١٨٧. وحاشية الشلبى على التبيين: ٤/٩٠، ملتان)

Allāh ta'ālā knows best.

Selling dry dates in exchange for fresh dates

<u>Question</u>

If a person sells one sā' of dry dates (tamar) in exchange for fresh dates (rutab), then Imām Abū Hanīfah rahimahullāh is of the view that it is

permissible. The other Imāms and Sāhibayn (Imām Muhammad and Imām Abū Yūsuf) are of the view that it is impermissible. The view of Sāhibayn is based on the following Hadīth which is quoted by most Hadīth experts and jurists:

عن سعد بن أبي وقاص رضي الله عنه أنہ قال: سمعت رسول الله صلى الله عليہ وسلم يسأل عن شرى التمر بالرطب، فقال: أينقص الرطب إذا يبس، قالوا: نعم، فنهاه عن ذلک رواه أصحاب السنن الأربعة، وقال الترمذي حسن صحيح. (شرح نقايہ للملا على القارى: ٢٦٤/٣، ابواب الربا)

What is the response of Imām Abū Hanīfah rahimahullāh to this Hadīth?

Answer

1. Imām Abū Hanīfah rahimahullāh says that because societal norms consider rutab to be tamar, the two can be exchanged with equal weights. When Imām Abū Hanīfah rahimahullāh went to Baghdad and people asked him about this issue, he said that Abū ʿAyyāsh – a narrator in the above transmission – is a weak narrator. He added that if rutab are tamar, the two can be exchanged because both are tamar. If they are not tamar, then it ought to be permissible to exchange them because they now belong to different categories.

However, Mullā ʿAlī Qārī rahimahullāh said that sometimes the genus is the same, yet a transaction wherein both sides are equal in weight is not permissible because the volume is not the same. For example, roasted wheat cannot be sold in exchange for un-roasted wheat because one settles to the bottom while the other does not. In other words, if this Hadīth were not present, even then exchanging rutab for tamar by weight ought to be impermissible just as roasted wheat cannot be sold in exchange for un-roasted wheat in volume.

2. Imām Abū Hanīfah rahimahullāh said that the above-quoted Hadīth contains Zayd ibn ʿAyyāsh who is also known as Abū ʿAyyāsh. He is classified as a majhūl (unknown) narrator. He is either Zurqā, Maulā Banī Zuhrah or Maulā Banī Makhzūm. This is why Ibn Hazm said with reference to him: رجل مجهول. Hākim said:

إن الشيخين لم يخرجا ہذا الحديث لما خشيا من جهالة زيد بن عياش.

This is why Ibn Hazm, Tahāwī, Tabarī and ʿAbd al-Haqq Ashbīlī classify this narration as maʿlūl.

Ibn ʿAyyāsh has two students, viz. ʿImrān ibn Anas and ʿAbdullāh ibn Yazīd. However, on account of the two students, the ignorance of the person has been removed while ignorance of the attribute remains. Furthermore, ʿImrān ibn Anas differed with ʿAbdullāh ibn Yazīd on two points:

a) He refers to him as Maulā Banī Makhzūm and not Maulā Banī Zuhrah.

b) ʿImrān ibn Anas added the word *nasī'ah*.

This is why this narration is not dependable. However, the objection which is made is that Imām Mālik rahimahullāh accepted the narration of Zayd ibn ʿAyyāsh; and Imām Mālik rahimahullāh is in the habit of not accepting narrations from weak narrators. Imām Tirmidhī rahimahullāh says that this Hadīth is correct. Ibn Jauzī rahimahullāh says:

روى عنه عبد الله بن يزيد وعمران بن أبي أنس فكيف يكون مجهولاً مع تصحيح الترمذي لحديثه قال: فقد عرفه أئمة النقل، قلت: وقد صححه ابن حبان أيضاً وابن خزيمة والدارقطني وذلك يقتضي أنهم عرفوا حاله. (الدراية على الهداية: ٣/٨٣، باب الربا)

The essence of the objection is that since many scholars consider Zayd ibn ʿAyyāsh to be an acceptable narrator, the weakness of the Hadīth is not severe. Furthermore, Hanafī jurists present weak narrations as evidence, e.g. the Hadīth related to qahqahah, masah ʿalā ar-raqabah. Also, as regards volume, it is difficult for both to be equal because rutab is mutakhallal (interpenetrative) while tamar settles down. Therefore, it ought to be impermissible as per Hanafī principles.

3. Another answer which is given on behalf of the Hanafīs is that since the narration of ʿImrān ibn Anas contains the word *nasī'ah*, it is a word which has been added by the narrator. We should therefore say that this transaction is impermissible if it is on credit, and ought to be permissible if it is a cash transaction.

An objection could be made by saying that both narrations should be accepted. If the dates are of the same category, a credit transaction will be impermissible. When the two cannot be equal, then it ought to be impermissible even if it is a cash transaction.

I found a convincing reply in favour of the view of Imām Abū Hanīfah rahimahullāh from the words of ʿAllāmah ʿAynī rahimahullāh. He writes:

وصح أيضاً بيع الرطب بالرطب متساوياً أو بيع الرطب بالتمر حال كونه متماثلاً فى الوزن عند أبي حنيفة وقالا: لا يجوز لأنه عليه الصلاة والسلام نهى عن بيع الرطب بالتمر وبه قالت الثلاثة- (رمز الحقائق فى شرح كنز الدقائق: ٦٠/٢، باب الربا، ادارة القرآن)

In other words, if rutab is sold in exchange for tamar while the weight of both is the same, it will be permissible. This is because absolute equality in weight is possible. If the view of impermissibility of Sāhibayn is taken to refer to volume, while Imām Abū Hanīfah's is taken to mean weight, the objection will be removed.

Other jurists also quote from ʿAllāmah ʿAynī rahimahullāh:

قال ابن نجيم: وصح أيضاً بيع الرطب بالتمر حال كونه متماثلاً كيلاً كذا في غير كتاب، وقال العينى: وزناً. (النهر الفائق: ٤٧٦/٣)

وقال الفقيه أبو السعود المصري: قوله كيلاً،كذا في غير كتاب خلافاً للعينى حيث اعتبر بالوزن. (فتح المعين شرح ملا مسكين: ٦٠٣/٢)

Yes, one noteworthy point is that there are Ahādīth which make reference to the fact that rutab is an item which is weighed.

عن أبي البختري سألت ابن عباس رضي الله عنه فقال: نهى النبي صلى الله عليه وسلم عن بيع النخل حتى يوكل منه أو يأكل منه وحتى يوزن. (رواه البخارى: ٢٩٩/١، كتاب السلم)

The text before this reads:

أبى البخترى الطائي قال: سألت ابن عباس عن السلم فى النخل فقال: نهى النبي صلى الله عليه وسلم عن بيع النخل حتى يوكل منه وحتى يوزن فقال

الرجل: وأى شيء يوزن فقال رجل إلى جانبه: حتى يحرز. (رواه البخارى: ۲۹۹/۱، كتاب السلم)

Allāh taʿālā knows best.

Retrieving unjustifiable taxes from the government

Question

A person received an electricity bill for R100 000 whereas a house like his normally receives a bill for two to three thousand rands. He contacted the municipal committee via a lawyer and asked for proof that he used that amount [R100 000] of electricity. The municipality did not provide any proof. Eventually, the man paid the amount. Bearing in mind that he had been charged unjustly, can he try to retrieve that amount from the government in whichever way possible?

Answer

It is permissible for him to resort to any possible means to retrieve the amount which he was unjustly billed. Nonetheless, it is foolish to dishonour one's self by resorting to incorrect means for the sake of a few pennies. He will not be permitted to bring shame to himself.

Hadrat Muftī Muhammad Shafīʿ Sāhib rahimahullāh writes:

If a government collects unjustifiable taxes from a Muslim, he may retrieve that money from any governmental department in the name of tax.

Imdād al-Muftīyyīn:

Question: The government of India has issued notes for its Prize Bond. A person receives an interest of six percent annually. I pay the government of India about three thousand rupees annually as income tax. Is it permissible for me to buy the Bond and accept its interest with the intention that I am re-taking the income tax which is an un-Islamic demand and which the government has taken from me?

Answer: The money which the government collects from you as income tax can be retrieved through a government bank or other governmental institution in whichever way possible. Whether the government refers to it as interest or something else, you may accept it with the intention of retrieving your lawful demand. There is no harm in this. It will not be interest for you. On such occasions, the

jurists permitted a person to retrieve the money which he was owed by stealing it or confiscating it from his debtor.

قال فى الشامية فى باب حد السرقة: إذا ظفر بمال مديونه له الأخذ ديانةً، بل الأخذ من خلاف الجنس على ما نذكره. (فتاوى الشامى: ٩٥/٤، سعيد) انتهى. (امداد المفتين: ٧٠٦/٢، كتاب الربا والقمار، دار الاشاعت)

Note: The fatwā of Muftī Shafī' Sāhib rahimahullāh is with respect to a government bank. It is not permissible to retrieve it from a private bank.

Observe the following principles:

وفي قواعد الفقه: الضرر يدفع بقدر الإمكان.-(قواعد الفقه، ص ٨٨)

وفى الأشباه والنظائر: الضرر يزال. (الاشباه والنظائر: ٥٢٠/١)

وفي قواعد الفقه عن السير: المظلوم له أن يدفع الظلم عن نفسه بما قدر عليه لكن ليس له أن يظلم غيره. (قواعد الفقه: ١٢٤)

وللاستزادة انظر: (درر الحكام فى شرح مجلة الاحكام: ٣٧/١، المادة: ٣١. وشرح القواعد الفقهية للشيخ أحمد الزرقا، ص ١١٨، المادة: ٣١، والاشباه والنظائر: ٥٢٠/١)

Allāh ta'ālā knows best.

The Sharī'ah ruling with regard to bank cards

Question

1. What is the ruling with regard to a bank credit card?
2. What is the ruling with regard to collecting cash through a credit card?
3. What is the ruling with regard to collecting a duty or commission from the credit card holder?
4. If a person makes a purchase with a credit card and does not make a payment on the due date, he is charged interest. Will the transaction be invalid because of the pre-condition of interest?

5. A bank sometimes gives prizes to credit card holders. Is it permitted to accept these prizes?

<u>Answer</u>

(1)

Currently, there are three types of cards:

1. Debit card.

The card holder has to have an amount of money from before hand in the account of the institution whose card it is. Whenever the card holder uses it, the institution pays the amount from his account. The card holder does not enjoy the benefit of credit. He can only use the card if he has money in his account. The institution collects a certain fee for issuing the card and enjoying its benefits.

It is undoubtedly permissible to use such a card. It is permissible to buy and sell through it because it neither involves incurring a debt nor any interest. Nonetheless, it will be the card holder's responsibility to abstain from using it for non-Sharīʿah purposes.

2. Charge card.

The card holder does not have any money with the institution from before hand. Instead, the institution provides him with the benefit of buying on credit. He is able to purchase for a specified period of time, and he will have to repay within that period. If he pays it within the specified period, he is not charged any interest. If he delays in his payment, he will have to repay together with interest which is charged. The institution also collects a certain fee for issuing the card and enjoying its benefits.

It is permissible to use such a card provided the following conditions are met:

a) The card holder must make full arrangements to ensure he pays before the due date so that he leaves no possibility of being charged interest.

b) It is the card holder's responsibility to abstain from using it for non-Sharīʿah purposes.

c) If his needs can be fulfilled through a debit card, it will be better for him to abstain from using such a card.

3. Credit card.

Here too, the card holder does not have any money with the institution. Rather, it is an interest-bearing credit agreement.

Although the institution specifies a due date - whereby if the card holder pays the full amount before it, he will not have to pay any interest – the fundamental agreement is based on interest, and he promises to pay it. In addition to this, the benefit of rescheduling is provided. This enables the card holder to increase the period of repayment. At the same time, the interest amount increases. In some cases, an additional amount is charged.

There are several types of credit cards: (1) American Express. (2) Visa. (3) MasterCard. (4) Diner's Club. And so on.

If a person is unable to acquire a debit or charge card, he may obtain a credit card while fulfilling the previously-listed conditions for a charge card. If not, it will be impermissible. Nonetheless, since there is more likelihood of interest, one should abstain from such a card.

(2)

There are two ways in which cash could be obtained through a credit card.

One way is for the card holder to go to a bank, present his card, and the bank hands over cash money to him. This will be permissible provided he is not charged any extra taxes for withdrawing the cash money, because this tax will be in exchange for the loan; and this is interest.

The other way is to withdraw cash from an ATM (automated transfer machine). This machine it self is astronomically expensive, and it incurs many expenses for its maintenance, upkeep and protection. If there is a specific charge for withdrawing money from it – without the institution taking into consideration the amount which is withdrawn – then it will be permissible. But if the institution makes the amount the basis for how much it is going to charge for the transaction, then not only is it impermissible but will also be classified as interest. Nonetheless, the institution may collect fees for issuing and maintaining the card.

(3)

It is permissible to charge a fee and duty to a bank card holder because these fall under service fees. For example, approving the card application, preparing it, embedding signs to it, preparing files for the account, telephonic and other expenses, etc. Furthermore, all office-related operations and services, installing machines in major cities – which is a major expense in its own. Obviously, fees are collected for these services. Therefore, there is nothing wrong with that.

(4)

Charging of interest. It should be clear that the agreement between a credit card holder and a bank is a loan agreement. The money given by a bank to a card holder is a debt which he is responsible for. The invalid condition of interest is attached to the loan agreement (if he does not pay the amount within a certain date, he will be charged interest). However, a loan is an ʿaqd-e-tabarruʿ not an ʿaqd-e-muʿāwaḏah. One of the principles of Ḫanafī jurisprudence is that attaching an invalid condition to an ʿaqd-e-muʿāwaḏah renders the agreement invalid. On the other hand, an invalid condition in an ʿaqd-e-tabarruʿ is a futile act in itself; the agreement is not invalidated. However, it contains the defect of an invalid condition. Nonetheless, if a person makes a firm promise that he will never practise on the invalid condition, he will pay the due amount within the specified date, and not allow himself to be charged interest; then – Allāh willing – he will not be sinning on account of the invalid condition.

(5)

It is permissible for a card holder to accept prizes which are given by banks and other institutions. A bank is like a loaner, and it is permissible for the one who took a loan from a bank to accept a gift or prize from it. Yes, if the debtor gives a gift or prize (because of the loan) to the one from whom he took the loan, then it is not permissible for the creditor to accept the gift.

Sources: *Credit Card Kei Sharʿī Aḫkām* of Maulānā Muḫammad Usāmah; the Fatāwā of Muftī Muḫammad Fārūq – Dār al-Iftā' Jāmiʿah Iḫtishāmīyyah, Karachi, pp. 130-132; *Fatāwā ʿUthmānī*, vol. 3, p. 354; *ʿAsr-e-Ḫāḏir Kei Peichīdah Masā'il Aur Oen Kā Ḫull*, compiled by Maulānā Mūsā Karmādī, vol. 2, pp. 195-199; *Jadīd Muʿāmalāt Ke Sharʿī Aḫkām*, vol. 1, pp. 142-146.

Observe the proofs from the marginalia of *Fatāwā ʿUthmānī*:

فى المعايير الشرعية:

الحكم الشرعي لأنواع البطاقات:

بطاقة الحسم الفوري:

يجوز للمؤسسات إصدار بطاقة الحسم الفوري ما دام حاملها يسحب من رصيده ولا يترتب على التعامل بها فائدة ربوية.

بطاقة الائتمان والحسب والآجل:

يجوز إصدار بطاقة الائتمان والحسم الآجل بالشروط الآتية:

(١) ألا يشترط على حامل البطاقة فوائد ربوية في حال تأخيره عن سداد المبالغ المستحقة عليه.

(٢) أن تشترط المؤسسة على حامل البطاقة عدم التعامل بها فيما حرمه الشريعة وأنه يحق للمؤسسة سحب البطاقة في تلك الحالة.

بطاقة الائتمان المتجدد:

لا يجوز للمؤسسات إصدار بطاقات الائتمان ذات الدين المتجدد الذي يسدده حامل البطاقة على أقسام آجلة بفوائد ربوية. والله أعلم.

Quoted from the marginalia of *Fatāwā ʿUthmānī*, vol. 3, pp. 355-356. This fatwā contains the signatures of Hadrat Muftī Muhammad Taqī ʿUthmānī Sāhib, Muftī ʿAbd ar-Ra'ūf Sakkharwī Sāhib, Muftī ʿAbd al-Mannān Sāhib, Muftī Mahmūd Ashraf Sāhib and Muftī Muhammad ʿAbdullāh Sāhib.

وما لا يبطل بالشرط الفاسد القرض... بأن قال أقرضتك هذه المائة بشرط أن تخدمني شهراً مثلاً فإنه لا يبطل بهذا الشرط، وذلك لأن الشروط الفاسدة من باب الربا وأنه يختص بالمبادلة المالية، وهذه العقود كلها ليست بمعاوضة مالية فلا تؤثر فيها الشروط الفاسدة، ذكره العيني. وفى البزازية: وتعليق القرض حرام والشرط لا يلزم. (البحر الرائق: ١٨٧/٦، باب المتفرقات من كتاب البيوع، كوئته)

وكذا فى تبيين الحقائق: ١٣٣/٤. والفتاوى البزازية على هامش الفتاوى الهندية: ٤٢٦/٤)

وفي مجمع الأنهر: وما لا يبطله الشرط الفاسد وهو سبعة وعشرون شيئاً على ما ذكره المصنف، الأول القرض... الخ. (مجمع الانهر: ١٥٨/٣، مسائل شتىٰ فى البيع، بيروت)

It is permissible for banks to give prizes and for card holders to accept them. This agreement is known as ʿaqd-e-tabarruʿ. In other words, to make a pre-condition of kindness to someone. Hadrat Maulānā Zafar Ahmad ʿUthmānī rahimahullāh states that this is permissible (*Imdād al-Ahkām*, vol. 3, p. 386)

There are some testimonies in favour of this:

1. A Persian neighbour invited Rasūlullāh sallallāhu ʿalayhi wa sallam to a meal. Rasūlullāh sallallāhu ʿalayhi wa sallam accepted it on the condition that Hadrat ʿĀ'ishah radiyallāhu ʿanhā was also invited. (*Sahīh Muslim*, vol. 2, p. 176)

2. Hadrat Abū Bakr radiyallāhu ʿanhu bought a palanquin for a camel from Hadrat ʿĀzib radiyallāhu ʿanhu and said to him: "Tell your son, Barrā', to carry this palanquin for me." Hadrat ʿĀzib radiyallāhu ʿanhu said: "He will take it on condition that you relate the story of the Hijrah." Hadrat ʿĀzib radiyallāhu ʿanhu preconditioned the favour of carrying the palanquin with relating the story of the Hijrah, and Hadrat Abū Bakr radiyallāhu ʿanhu accepted the condition of relating the story.

عن البراء رضي الله عنه قال: اشترى أبو بكر رضي الله عنه من عازب رضي الله عنه رحلاً بثلاثة عشر درهماً، فقال أبو بكر رضي الله عنه لعازب رضي الله عنه: مر البراء فليحمل إلي رحلي، فقال عازب رضي الله عنه لا، حتى تحدثنا كيف صنعت أنت و رسول الله صلى الله عليه وسلم حين خرجتما من مكة. (رواه البخارى: ٥١٥/١، مناقب المهاجرين)

Allāh taʿālā knows best.

The ruling with regard to garage cards

Question

A company issues a garage card to people. When they buy petrol through it, the company will pay the bill to the garage. At the end of the month, the company sends an account to the card holder and adds

fifteen percent to the total which the card holder will have to pay. Is a transaction of this nature permissible?

<u>Answer</u>

The general manner in which a garage card operates is that a person can continue filling petrol in his vehicle through the card. At the end of the month, he receives a full statement with a record of the amount of petrol which he filled. He will then have to pay for the total purchases. There is no need to pay any additional amount. This system is permissible because there is no interest and additional charges. The person merely pays whatever amount he took on credit.

In the present case where you mention an additional charge of fifteen percent – if this is the way it operates – then it is unlawful. It is clear-cut interest. Yes, if the company provides a respite – for example, if the full amount is paid within a month, then there will be no additional charge; and if it is paid after the due date, then there will be a charge of fifteen percent – then there will be a leeway for such an agreement in the sense that the card holder must not allow himself to be charged interest and he must pay the full amount before the due date.

Fatāwā ʿUthmānī:

When a card is used, it is essential for the card holder to pay the amount within the due date so that he is not charged interest. The better way to do this is to choose a direct debit. In other words, the card holder instructs the bank to pay the bill directly so that he is not charged interest in the case where he delays unintentionally.[1]

وما يصح ولا يبطل بالشرط الفاسد لعدم المعاوضة المالية... القرض والهبة. وفى الشامية: (قوله القرض)كأقرضتک ہذه المائة بشرط أن تخدمني سنة، وفى البزازية: وتعليق القرض حرام والشرط لا يلزم. (الدر المختار مع رد المحتار: ٢٤٩/٥، باب ما يبطل بالشرط الفاسد، سعيد)

Allāh taʿālā knows best.

[1] *Fatāwā ʿUthmānī*, vol. 3, p. 353.

DISBURSEMENT OF USURY

Acquiring usurious wealth from an unbeliever

Question

When a non-Muslim receives interest wealth, does it enter his ownership? If he presents a gift of interest wealth to a Muslim, will it be permissible for a Muslim to accept it? What if a Muslim gifts you with interest wealth?

Answer

When interest wealth comes to a Muslim, he does not become its owner. It is necessary for him to return it. If he knows the owner of that wealth, he must return it to him. If he does not know its owner, he must give it in charity without any intention of reward. He must treat this wealth as a calamity, get rid off it as soon as possible, and then give it to a poor person who is not a sāhib-e-nisāb. This will be permissible. However, it is not permissible for him to accept interest wealth as a gift.

ويردونها على أربابها إن عرفوهم وإلا تصدقوا بها، لأن سبيل الكسب الخبيث التصدق إذا تعذر الرد على صاحبه. (فتاوى الشامى: ٣٨٥/٦، كتاب الكراهية، فصل فى البيع، سعيد)

If a non-Muslim receives interest wealth, he becomes its owner. It will be permissible to accept a gift from him provided he does not commit a rationally unlawful and detestable act such as cheating, stealing, robbing, etc. Yes, an Islamic government will not permit non-Muslims in an Islamic state to deal in interest.

This issue revolves around whether non-Muslims are addressees of subsidiary injunctions or not. The jurists differ in this regard. Some scholars are of the view that initially they are addressed as regards īmān and punishments; and not on dealings and transactions. Other scholars state that they are also addressed in matters related to dealing and transactions. No matter what, non-Muslims become owners of interest.

Maulānā Zafar Ahmad Thānwī rahimahullāh writes in *Ahkām al-Qur'ān*:

تحقيق أن الكفار مخاطبون بالفروع أم لا؟

الكفار مخاطبون بالإيمان إجماعاً، وكذا بالمشروع من العقوبات والمعاملات، وكذا بالفروع وعامة الشرائع في حكم المواخذة فى الآخرة بلا خلاف، ذكره فى المنار وغيره، وأما في وجوب الأداء في أحكام الدنيا فالصحيح أنهم غير مخاطبين به، وما نسب إلى أهل العراق من مشايخنا وإلى الأكثر من أصحاب الشافعي من كونهم مخاطبين بوجوب الأداء فى الدنيا فهو مؤول بأنهم مأمورون بأن يومنوا ثم يصلوا كما في عامة كتب الأصول، وذهب البخاريون إلى أنهم مكلفون بالفروع في حق الاعتقاد فقط والصحيح المؤيد بالنصوص والآيات هو ما ذهب إليه الجمهور أنهم مخاطبون باعتقاد الشرائع وكذا بأدائها باستجماع شرائطها منها تقديم الإيمان. (احكام القرآن: ١/١١، ١٢. وكذا فى الشامى: ٤/١٢٨، سعيد)

After quoting the texts of the jurists, Maulānā Zafar Ahmad Thānwī rahimahullāh writes:

The following points are learnt from the quoted texts:

1. Imām Zufar rahimahullāh is of the view that all the general directives of the Sharīʿah as regards dealings and transactions apply to non-Muslims as well, irrespective of whether they are harbī or dhimmī. Since the directive is general, the injunction will generally be applied. Therefore, the ruling of invalidity will be applied to whatever dealings the harbī and dhimmī do which are against the Sharīʿah. This, notwithstanding the fact that a harbī, due to the absence of governorship over him, and a dhimmī, due to the covenant with him, will not be interfered with.

2. Imām Abū Yūsuf and Imām Muhammad rahimahullāh are of the view that the dealings of a harbī are against the Sharīʿah. The ruling of invalidity will not be applied to everyone because they did not adhere to the injunctions of Islam. This means that a general directive is insufficient for the application of an injunction. Instead, adherence is also a precondition; and this is not found in a harbī. However, the ruling of invalidity will apply to those dealings of the dhimmī which are against the unanimous rulings of Islam. This is because they have already adhered to Islamic injunctions in matters related to dealings and transactions. (In our times, most non-Muslim countries are classified as dār al-amn. The non-Muslims in these countries do not

adhere to Muslim rules. Therefore, this ruling will not apply in such countries. Nonetheless, a non-Muslim will become an owner of interest.)

3. Imām Abū Hanīfah rahimahullāh is of the view that the ruling of invalidity will not be applied to those dealings of a dhimmī which are against the Sharīʿah. This is on the condition that those dealings are in line with their own religion. Yes, if a certain condition is laid down in the agreement, he will have to adhere to it. As for Sharīʿah transactions which are not in line with his beliefs and were not laid down in the agreement, a dhimmī is not required to adhere to them. When he carries out dealings which are in line with his religion, they will be considered to be correct, and they will not be classified as invalid.[1]

A few objections and answers to them

1. Since the jurists state that non-Muslims are addressed as regards subsidiary matters of Dīn and in matters related to transactions, the ruling of usury ought to be the same as it is for us. This is gauged from a text of *al-Manār* and other books.

حيث قال: والكفار مخاطبون بالأمر بالإيمان وبالمشروع من العقوبات والمعاملات - وفي نور الأنوار: وأما المعاملات فهي دائرة بيننا وبينهم فينبغي أن نعامل معهم حسب ما تعاملنا بيننا فى البيع و الشراء والإجارة وغيرها سوى الخمر والخنزير فإنهما مباحان لهم، لا لنا. (نور الانوار، ص ٥٩، ٦٠)

Therefore, if a non-Muslim engages in a transaction which is against the Sharīʿah and acquires money through it, the money ought to be harām.

An answer to this objection is provided from a text of Hadrat Maulānā Zafar Ahmad ʿUthmānī rahimahullāh:

The crux of the answer is that although non-Muslims are addressed in subsidiary matters related to punishments and transactions, a general address is insufficient to issue a ruling of impermissibility and invalidity. Rather, adherence is also a prerequisite. Harbīs have disregarded adherence to the injunctions of Islam totally; neither in matters which are in line with their beliefs nor those which are against their beliefs. Therefore, no matter how they acquire money – whether

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[1] *Imdād al-Ahkām*, vol. 4, p. 390.

through interest, usurping or invalid transactions, or whether they are in line with their religion or against it – it will enter their ownership and it will be permissible for a Muslim to accept it as a salary.[1]

2. The texts which make reference to the devouring of interest are general in nature – whether the person is a Muslim or not. How, then, will it be permissible for a non-Muslim to accept interest money?

Taking extra in any transaction (in items of the same genus) without compensation is classified as interest. For example, you loan R100 and lay down the condition that when it is repaid after one month, the person must pay you R150.

Sayyid Sharīf Jurjānī ra<u>h</u>imahullāh states:

الربا: ہو فی اللغة: الزیادة، وفی الشرع: ہو فضل خالٍ عن عوض شرط لأحد العاقدین. (التعریفات، ص ۱۱۲)

No one considers this to be lawful. It is unanimously classified as <u>h</u>arām. But this is not the case in the matter under discussion. Rather, the non-Muslim became an owner of the wealth and he is now giving it over into the ownership of a Muslim. There is no reason for classifying it as impermissible. After all, a person may exercise his full right over what he owns.

'I<u>t</u>r Hidāyah:

Interest refers to every addition – whether tangible or intangible – which is preconditioned in a transaction without having given anything in exchange for it...A loan is eventually a recompense. Therefore, it is <u>h</u>arām to give a loan and collect a profit from it. In gifting, no mention is made of a recompense; so if the person who accepts a gift gives something more in return, this addition will be lawful. Anything which is given or received without laying down a condition has nothing to do with interest. Rather, it is a donation and an act of kindness.[2]

3. Here is an easy way of earning interest: Take interest from a non-Muslim and it will be lawful. For example, a company employs a person as a special employee. It says to him that he must continue engaging in transactions and earn interest from them. The interest will then be lawful for us. What is the answer to this?

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[1] *Imdād al-A<u>h</u>kām*, vol. 4, p. 399.

[2] *'I<u>t</u>r Hidāyah*, p. 165.

It is not permissible to acquire interest from a non-Muslim, as was mentioned previously. However, if he acquires it and becomes its owner, and then wants to give it as a gift without recompense to a Muslim, or give it to a Muslim employee as a salary, then it will be permissible. It is haram for a Muslim to become an owner of interest, while there is no reason for its impermissibility for a non-Muslim. Since he has become an owner of the interest, he can use it for himself or give it to someone as a gift.

4. We learn from a text of *al-Hidāyah* that usurious transactions of loaning and borrowing are excluded; they are not permissible even for non-Muslims. What is the answer to this?

The text of *al-Hidāyah* reads as follows:

والربا مستثنى عن عقودهم لقوله عليه السلام: الا من أربى فليس بيننا وبينه عهد. (الهداية: ٢/٣٣٨)

The following is narrated in *Musannaf Ibn Abī Shaybah*:

عن الشعبي قال: كتب رسول الله صلى الله عليه وسلم إلى أهل نجران وهم نصارى: أن من بايع منكم بالربا فلا ذمة له. (مصنف ابن ابى شيبة: ٢٠/٥٥٧)

Answer: The ruler of an Islamic state must not permit dhimmīs to engage in usurious transactions. Nonetheless, if usury is permissible according to them and they accept it, then a non-Muslim will be classified as the owner of that wealth. Nowadays, there is no Islamic country which prohibits anyone from usurious transactions. Therefore, if non-Muslims engage in usurious transactions among themselves, they will be owners of that wealth.

Abū ʿUbayd Qāsim ibn Salām writes:

قوله: ومن أكل منهم الربا فذمتي منه بريئة لا نراه غلظ عليهم أكل الربا خاصة من بين المعاصي كلها ولم يجعله لهم مباحاً وهو يعلم أنهم يرتكبون من المعاصي ما هو أعظم من ذلك من الشرك وشرب الخمر وغيره إلا دفعاً عن المسلمين وألا يبايعوهم به فياكل المسلمون الربا، ولو لا المسلمون ما كان أكل أولئك الربا إلا كسائر ما هم فيه من المعاصي، بل الشرك أعظم.

(الاموال: ٤٦٦/١، بيروت. والاموال لابن زنجوية: ١٠٣/٢. وذكره عن ابى عبيدة الزيلعى فى نصب الراية: ٢٠٣/٣)

إعلاء السنن:

ولنا أن حرمة الربا ثابتة في حقهم، وهو مستثنیٰ من العهد فإن النبي صلى الله عليه وسلم كتب إلى نصارى نجران من أربي فليس بيننا وبينه عهد وكتب إلى مجوس هجر: إما أن تدعوا الربا أو تاذنوا بحرب من الله ورسوله، فالتعرض لهم فى ذلك بالمنع لا يكون غدراً بالأمان كذا فى المبسوط. (٥٨/١٤) وقد تقدم في شروط أهل الذمة من كتاب الجهاد ما يدل على نهيه صلى الله عليه وسلم والخلفاء الراشدين أهل الذمة عن الإرباء في دار الإسلام وأيضاً: فإنما تثبت العصمة في حق الأحكام بالإحراز والإحراز بالدار لا بالدين، لأن الدين مانع لمن يعتقده حقاً للشرع دون من لا يعتقده ولقوة الدار يمنع عن ماله من يعتقد حرمته ومن لم يعتقده كما فى المبسوط: (٥٨/١٤) أيضاً فالاعتبار بالدار، هو الصحيح. (اعلاء السنن: ٣٥٢/١٤. والمبسوط: (٥٨/١٤)

Allāh taʿālā knows best.

Paying interest with interest

Question

Khālid borrowed R100 000 from a bank and bought a house with the money. The bank asked him to repay R110 000. Khālid wants to sell the house to Zayd for R110 000 so that he can repay his loan. Zayd said to him that he will pay him R100 000 from his lawful wealth, and R10 000 from interest. Is it permissible to do this?

Answer

It is a major sin to get into interest-bearing loans. The Qur’ān and Ahādīth contain terrifying warnings in this regard. Khālid should therefore repent and make a firm resolution not to take interest-bearing loans in future. As for the interest amount, the jurists say that if the owner is known, it must be returned to him. If not, it must be given to the poor without intention of reward. As for paying interest

with interest, the ruling is that the person must return it to the bank from which he received it. It is not permissible to receive it from one bank and pay another bank.

بذل المجهود:

وأما إذا كان عند رجل مال خبيث فأما إذا ملكہ بعقد فاسد أو حصل لہ بغير عقد ولا يمكنہ أن يرد إلى مالكہ ويريد ان يدفع مظلمتہ فليس لہ حيلة إلا أن يدفع إلى الفقراء. (بذل المجهود: ٣٧/١)

البحر الرائق:

قالوا: وعلى ہذا لو مات رجل وكسبہ من ثمن الباذق والظلم أو أخذ الرشوة تعود الورثة ولا يأخذون منہ شيئاً وہو الأولى لہم ويردونہ على أربابہ إن عرفوہم وإلا يتصدقوا بہ لأن سبيل الكسب الخبيث التصدق إذا تعذر الرد. (البحر الرائق: ٢٠١/٨، فصل فى البيع ،كتاب الكراہية، كوئتة)

وللاستزادة انظر: (تبيين الحقائق: ٢٧/٦، فصل فى البيع، ملتان. والدر المختار مع رد المحتار: ٣٨٥/٦، فصل فى البيع، سعيد)

Niẕām al-Fatāwā:

The Sharī'ah ruling for every ẖarām wealth is that, if possible, it must be returned to where it was obtained from. Based on this, from wherever a person receives interest, he must return it to that place. The Sharī'ah provides this leeway. If it is not possible to do this, one must give it in charity to the poor to save one's self from the misery of interest.[1]

Fatāwā 'Uthmānī:

If, in the past, a person retained money in an interest account, and he took an interest-bearing loan, he can clear himself by transferring it from one account to another provided the received interest is not

[1] *Niẕām al-Fatāwā*, vol. 1, p. 191.

more than the interest which is paid. It must be equal. However, he must desist totally from doing this in the future.[1]

Jadīd Fiqhī Masā'il:

If a person is compelled into taking an interest-bearing loan, and he then has an amount of interest which he received from a bank, there will be no harm in using the same amount to pay the interest. It is also a sin to pay interest because by doing this, a person is spending the Allāh-given halāl wealth in a harām avenue. If a person uses interest money to pay interest, he is saving his halāl wealth from harām. There is hope that he will not be taken to task for it. Maulānā Thānwī rahimahullāh is inclined to this view.[2]

Allāh ta'ālā knows best.

Paying government taxes with interest money

Question

Is it permissible to pay the following taxes with interest money:

1. Income tax.
2. Other taxes charged on different occasions.
3. V.A.T. – it is obligatory to pay 14% tax on items which are purchased.

What about paying the following municipal taxes with interest money:

1. Rates on an empty plot of land.
2. Rates on land where houses are constructed.

Answer

As far as we know, the banks in South Africa are not government banks; they are private banks. Therefore, it is not permissible to pay government taxes with interest money. Interest money must either be returned to the one from whom it was received, or given in charity to the poor without the intention of reward. Nowadays, the second option is chosen because there is no way of returning interest money to a bank. Furthermore, the above-mentioned taxes are not classified as oppressive. Rather, we benefit – directly or indirectly – from them. This would be synonymous to deriving benefit from interest.

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[1] *Fatāwā 'Uthmānī*, vol. 3, p. 280.

[2] *Jadīd Fiqhī Masā'il*, vol. 1, p. 254.

قال شيخنا: ويستفاد من كتب فقهائنا كالهداية وغيرها أن من ملك بملك خبيث ولم يمكنه الرد إلى المالك فسبيله التصدق على الفقراء، قال: ومثله يقول ابن القيم في بدائع الفوائد، ...قال: والظاهر أن المتصدق بمثله ينبغي أن ينوي به فراغ ذمته ولا يرجو به المثوبة، نعم يرجوها بالعمل بأمر الشارع، وكيف يرجو الثواب بمال حرام ويكفيه أن يخلص منه كفافاً رأساً برأسٍ! وفي سنن الدارقطني (٥٤٥/٢) بإسناده عن عبد الواحد بن زياد قال: قلت: لأبي حنيفة من أين أخذت هذا؟ الرجل يعمل في مال الرجل بغير إذنه أنه يتصدق بالربح! قال: أخذته من حديث عاصم بن كليب اه، وحديث ابن كليب أخرجه أبو داود في سننه (ص ٤٧٣) في (باب اجتناب الشبهات) من كتاب البيوع: عن عاصم بن كليب عن أبيه عن رجل من الأنصار قال: خرجنا مع رسول الله صلى الله عليه وسلم في جنازة... فلما رجع استقبله داعى امرأة، فجاء وجىء بالطعام فوضع يده، ثم وضع القوم فأكلوا فنظر آباؤنا رسول الله صلى الله عليه وسلم يلوك لقمة في فمه، ثم قال: "أجد لحم شاة أخذت بغير إذن أهلها" فأرسلت المرأة، قالت: يا رسول الله! إنى أرسلت إلى البقيع يشتري لي شاة فلم أجد، فأرسلت إلى جار لي قد اشترى شاةً أن أرسل إلى بثمنها فلم يوجد، فأرسلت إلى امرأته، فأرسلت إلي بها، فقال رسول الله صلى الله عليه و سلم: أطعميه الأسارى اه، (رواه ابو داود: ١١٧/٢، باب اجتناب الشبهات من كتاب البيوع). رواه الدارقطني في سننه (في باب الصيد والذبائح: ٥٤\٢٨٦\٤). وفيه: فبينا هو يأكل إذ كف يده، وفيه أطعموها الأسارى، وفي طريق آخر: فلما أخذ رسول الله صلى الله عليه وسلم لقمته رمى بها. (في باب الصيد والذبائح: ٥٥\٢٨٦\٤). (معارف السنن: ٣٤/١، ٣٥، باب ما جاء لا تقبل صلاة بغير طهور، تحت قوله: ولا صدقة من غلول، سعيد)

Niẕām al-Fatāwā:

The fundamental principle is that unlawful wealth must be returned to its owner in whichever way possible.

إذا علم المالک بعینہ فلا شک في حرمتہ ووجوب ردہ علیہ. فتاوی الشامی، باب البیع الفاسد، سعید.

If it cannot be returned to the original owner, a person must save himself from the sinful consequences by giving it in charity to a person who is eligible to receive charity. He must remove it from his ownership as quickly as possible. He must neither use it for himself nor make an intention of reward after giving it in charity.

وأما إذا کان عند رجل مال خبیث فأما إذا ملکہ بعقد فاسد أو حصل لہ بغیر عقد ولا یمکنہ أن یرد إلی مالکہ ویرید أن یدفع مظلمتہ فلیس لہ حیلة إلا أن یدفع إلی الفقراء. (بذل المجهود: ۳۷/۱)

Interest money received from the central government can be used to pay income tax and sales tax if these taxes are going back to the central government. It cannot be given to the municipal corporation board, municipality tax, and other similar taxes.[1]

Ahsan al-Fatāwā:

Interest received from a bank is not from the government treasury. Therefore, it cannot be used to pay income tax. Since the owner is unknown, it is obligatory to give it in charity to the poor.[2]

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

Interest from a bank is not from the government treasury and has nothing to do with the government. Therefore, it is incorrect to pay income tax with interest money. Rather, because the owner is unknown, it is obligatory to give it in charity to the poor.[3]

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[1] *Niẕām al-Fatāwā*, vol. 1, p. 185.

[2] *Ahsan al-Fatāwā*, vol. 7, p. 21.

[3] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 163.

Kitāb al-Fatāwā:

Income tax is a non-obligatory tax which is collected in a non-obligatory manner. If a person is compelled to keep money in a bank under a certain scheme and he receives interest from it, he may pay income tax with the interest money which he received. This is on condition that the bank or financial institution is a governmental one...It will not be permissible to use interest money received from a [private] bank to pay general taxes such as municipal taxes.

Taxes [e.g. rates] on houses are collected for services which the government provides to the public. This is a lawful and equitable tax; the benefits of which are enjoyed by the tax payer. If interest money is used to pay these taxes, it will be synonymous to deriving benefit from usury.[1]

To summarize, there are two types of taxes:

1. Equitable taxes – the benefits of which reach us in some way or another. There is no room whatsoever to pay these taxes with interest money. This is irrespective of whether the interest is received from a government bank or a private bank.

2. Unjust taxes, e.g. income tax, sales tax, etc. Interest received from a central or governmental bank may be used to pay these taxes. This is because it is synonymous to returning it to its owner. It is not permissible to pay these taxes with interest money received from private banks.

Jadīd Fiqhī Masā'il:

There are two types of taxes which the government collects from the public. Some of them are equitable and permitted in Islam. For example, providing the services of water, electricity, roads, hospitals, libraries, parks, etc. Municipalities collect taxes for these services and the benefits of these services are enjoyed by us.

The second type is known as unjust and non-obligatory taxes, e.g. income tax. In addition to being unjust according to the Sharī'ah, they are irrational.

It will not be permissible to use interest money received from a bank to pay the first type of taxes.[2]

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[1] *Kitāb al-Fatāwā*, vol. 5, pp. 318-319.

[2] *Jadīd Fiqhī Masā'il*, vol. 1, p. 253; *Īḏāḫ al-Anwār*, vol. 1, p. 100.

The books of jurisprudence state that if a person seized a slave from someone and made him a labourer to earn money, and the slave died while under the one who seized him, then when he has to repay the slave master for the slave, the master can include all the amounts which the slave earned. This is because this amount will reach the original owner due to which it became tainted, whereas there is no harm in it for the owner. However, if the one who seized the slave sold the slave to someone, and the slave dies while under the buyer, and the original owner then makes a claim and proves his ownership, and he collects a recompense from the buyer, the one who stole the slave cannot give the earnings of the slave to the buyer. This is because the buyer is not the owner. We learn from this that when interest money goes back to its owner, there is no problem with that. But it is impermissible to give it to someone else. This is why interest money has to be returned to the one from whom it was taken or received. If this is not possible, it must be given as charity to the poor. It is not permissible to receive interest from a private bank and to then use it to pay government taxes.

الفتاوى السراجية:

إذا آجر المغصوب يستعين بأجره في ضمان القيمة ويتصدق بالفضل. (الفتاوى السراجية على هامش فتاوىٰ قاضيخان: ٢/٧٢)

الهدايه:

فلو هلك العبد في يد الغاصب حتى ضمنه، له أن يستعين بالغلة في أداء الضمان لأن الخبث لأجل المالك، ولهذا لو أدى إليه يباح له التناول فيزول الخبث بالأداء إليه بخلاف ما إذا باعه فهلك في يد المشتري ثم استحق وغرمه ليس له أن يستعين بالغلة في أداء الثمن إليه، لأن الخبث ما كان لحق المشتري إلا إذا كان لا يجد غيره لأنه محتاج إليه فله أن يصرفه إلى حاجة نفسه، فلو أصاب مالاً يتصدق بمثله إن كان غنياً وقت الاستعمال، وإن كان فقيراً فلا شيء عليه لما ذكرنا. (الهدايه: ٣/٣٧٥)

(حاشية الطحطاوى على الدر المختار: ١٠٤/٤. وتبيين الحقائق: ٢٢٥/٥. وتكملة البحر الرائق: ١١٤/٨. والفتاوى الشامى: ١٨٩/٦. ومجمع الضمانات: ٢٩٤/١. الفتاوى البزازية: على هامش الهندية: ٧٠/٦)

Allāh taʿālā knows best.

Interest money for welfare works

<u>Question</u>

Is it permissible to dig a well for the poor and needy with interest money? Can such money be used to construct a madrasah boundary wall? Also, can it be used for other welfare and charity works?

<u>Answer</u>

The scholars and muftīs differ on this issue. Most muftīs say that interest money should not be used to dig a well. Instead, it should be given in charity to the poor without intention of reward. Some muftīs of India, e.g. Muftī ʿAbd ar-Ra<u>h</u>īm Lājpaurī ra<u>h</u>imahullāh, say that interest money can be used for public welfare works. However, the view of caution is practised by the majority. Nonetheless, if anyone has spent it in this way, there is leeway for it. If it becomes essential to dig a well or spend interest money on other similar noble actions, one could give the interest money to a poor person and get him to undertake that task.

Fatāwā Ra<u>h</u>īmīyyah:

The issue is a contentious one. It is better to give interest money to a poor person. There is leeway to use it for the construction of roads and other public welfare works. It cannot be used for a masjid. It may be used for the construction of masjid toilets.[1]

Muftī Ismāʿīl Kachaulwī <u>S</u>ā<u>h</u>ib objected to the above fatwā of Muftī ʿAbd ar-Ra<u>h</u>īm <u>S</u>ā<u>h</u>ib ra<u>h</u>imahullāh, so the latter quoted the fatāwā of senior ʿulamā' to support his view. For example, the fatāwā of <u>H</u>a<u>d</u>rat Maulānā Mu<u>h</u>ammad Kifāyatullāh <u>S</u>ā<u>h</u>ib, <u>H</u>a<u>d</u>rat Muftī Saʿīd A<u>h</u>mad <u>S</u>ā<u>h</u>ib – the chief muftī of Ma<u>z</u>āhir al-ʿUlūm, Shaykh al-Islām <u>H</u>a<u>d</u>rat <u>H</u>usayn A<u>h</u>mad Madanī, <u>H</u>a<u>d</u>rat Muftī Ma<u>h</u>mūd <u>H</u>asan Gangohī and others. Refer to *Fatāwā Ra<u>h</u>īmīyyah*, vol. 9, pp. 256-260.

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[1] *Fatāwā Ra<u>h</u>īmīyyah*, vol. 9, p. 279.

Islāmī Fiqh:

If a person is forced to deposit money in a bank and he receives interest on it, he must not use it on himself or his family. Instead, he must give it to the poor without the intention of reward. Alternatively, he may give it to a reliable person who will then use it for public welfare works such as the construction of roads, public toilets, etc.[1]

Hadrat Muftī Muhammad Taqī Sāhib writes in *Fatāwā ʿUthmānī:*

To free one's self from interest money, one should give it in charity to a poor person. It is essential to make him an owner of it. This money cannot be used for public welfare works.[2]

However, in another detailed fatwā, he writes that interest money may be spent for public welfare works. He also presents a fatwā of Hadrat Hakīmul Ummat Maulānā Thānwī rahimahullāh as evidence. He too classified interest money as wājib at-tasadduq (that which is obligatory to give in charity) and not wājib at-tamlīk (that which is obligatory to give in ownership). Hadrat Muftī Rafīʿ Sāhib concurs with this fatwā.

The crux of his discussion is as follows:

1. Hadrat Hakīmul Ummat rahimahullāh said that this type of wealth falls under the ruling of luqtah (a lost item which has been found by someone). That is, it must be given as optional charity on behalf of the original owner. It is not necessary to make the person its owner. (*ad-Durr al-Mukhtār Maʿa Radd al-Muhtār*, vol. 2, p. 338; *Sharh Manzūmah Ibn Wahbān*, vol. 1, p. 88)

2. Nowhere do the jurists write explicitly that milk-e-khabīth (tainted and filthy wealth) is wājib at-tamlīk. Rather, the word tasadduq is presented as evidence.

3. Milk-e-khabīth which is wājib at-tasadduq is not like zakāh as regards its recipients. There is a difference between the two on the basis of several reasons. This is why the jurists say that it can be given to one's wife and children as well. (*Hāshiyah al-Hamawī ʿAlā al-Ashbāh*, vol. 2, p. 106; *ad-Durr al-Mukhtār Maʿa Radd al-Muhtār*, vol. 4, p. 278)

However, the objection to giving it to one's wife and children is that this charity is on behalf of the owner of that wealth while the person who found it [the lost item] is merely a means. Yes, we learn from the

[1] *Islāmī Fiqh*, vol. 2, p. 369.

[2] *Fatāwā ʿUthmānī*, vol. 3, p. 279.

permissibility of using it for the shrouding and burial of a deceased person that tamlīk (ownership) is not necessary because ownership is not found in shrouding and burial.

4. According to the ẕāhir ar-riwāyah, this wealth can be given to the Banū Hāshim. (*ad-Durr al-Mukhtār Maʿa Radd al-Muẖtār*, vol. 2, p. 351)

5. It is not permissible to give zakāh to a non-Muslim, whereas this wealth can be given to a non-Muslim. (*Shāmī*, vol. 4, p. 351; *Fatāwā Dār al-ʿUlūm Zakarīyyā*, vol. 3, p. 220).

6. The giving of tainted and filthy wealth to the poor only is the view of the H̱anafī jurists alone. The other Imāms permit spending it for general welfare works.

المعيارالمعرب: ١٤٦/٦، بيروت. والذخيرة: ١٦٧/٥، بيروت. وشرح المهذب: ٥٢٠/١٠، بيروت. ونهاية المحتاج: ١٨٥/٥)

Further details: *Fatāwā ʿUthmānī*, vol. 3, pp. 128-140.

Several scholars say that it is impermissible. Observe their fatāwā:

H̱aḏrat Muftī Muẖammad Shafīʿ Ṣāẖib:

It is essential for the poor to take ownership of such wealth. It is not permissible to use it for the construction of madāris and other waqf properties. The proof is as follows:

1. The texts of the jurists which refer to wealth of this nature contain two types of expressions: تصدق به or وجب عليه التصدق. Sometimes, they say: تصدق به على الفقراء والمساكين. Nowhere do they make mention of spending this money on waqf properties, welfare works and so on.

2. When the words ṣadaqah and taṣadduq are uttered, then as per the norms of the jurists, the wealth becomes wājib at-tamlīk.

For detailed proofs refer to *Imdād al-Muftīyyīn*, vol. 2, pp. 383-386.

Fatāwā Maẖmūdīyyah:

The construction of schools, toilets, etc. does not fall under the category of eligible recipients. The essence of taṣadduq is that the recipient must be eligible. This is why we are prohibited from using this money for such purposes. The eligible recipient must be made an owner of the money, and he may then spend it as and where he wants.[1]

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[1] *Fatāwā Maẖmūdīyyah*, vol. 16, p. 386.

Āp Ke Masā'il Aur Oen Kā Hull:

Interest money must be given to a poor and needy person as charity without intention of reward. It is not permissible to spend it for welfare works.[1]

Jadīd Fiqhī Masā'il:

Interest money can be given for the individual needs of a poor person and on public welfare works such as digging of wells. It should not be used for the construction of masājid and madāris. However, the 'ulamā' permitted its use for the construction of toilets.[2]

This means that Maulānā Khālid Sayfullāh Sāhib is of the view that it can be used for public welfare works, but not for masājid and madāris. However, it can be used for the construction of toilets in masājid and madāris.

Mahmūd al-Fatāwā:

In order to free one's self from the misery of usury, one may give it to the poor without the intention of reward. They will be made owners of it.[3]

There are senior 'ulamā' on both sides, and a person may follow either of the two. Nonetheless, it is better to be on the side of caution. The leeway to spend interest money for public welfare works is based on caution.

Nizām al-Fatāwā:

After giving it in the ownership of a poor person, it may be used for the cleaning of masjid toilets. This is how the leeway will be applied: Give the interest money to poor people who are eligible and make them owners of it. The latter will then give it as a donation to the masjid.

وقدمنا أن الحيلة أن يتصدق على الفقير، ثم يأمره بفعل هٰذه الأشياء. الدر المختار مع رد المحتار: ٣٤٥/٢، كتاب الزكوٰة، باب المصرف، سعيد. (نظام الفتاوىٰ: ١٩٩/١)

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[1] *Āp Ke Masā'il Aur Oen Kā Hull*, vol. 6, p. 242.

[2] *Jadīd Fiqhī Masā'il*, vol. 1, p. 253.

[3] *Mahmūd al-Fatāwā*, vol. 3, p. 64.

Allāh ta'ālā knows best.

Assisting a political party with interest money

Question

Elections were held in Barbados. A Muslim organization wanted to support a party financially. This organization initiated a collection drive among Muslims. It also collected interest money from them. My question is: Is it permissible for a Muslim to collect interest money for the sake of supporting a political party? If it is not permissible, what is the ruling with regard to the money which was collected and given to the political party?

Answer

The scholars differ with regard to spending interest money on public welfare works. This was explained previously. However, in this case, financial aid in a non-Muslim country could bring benefits to Muslims. Since it is a non-Muslim country, and the party is supported by collecting interest money – while Muslims do not use that money for themselves – then it ought to be permissible.

Kifāyatul Muftī:

Question: Can interest money be used for religious education, public welfare works and poor Muslims?

Answer: Interest money can be collected and spent on the poor, for the fulfilment of debts of Muslims, for education (primary and Dīnī), and for all public welfare works.[1]

Jadīd Fiqhī Masā'il:

When it comes to interest money received from a bank, it must be borne in mind that it can neither be spent on one's self nor given in charity...It may be used for other purposes such as the individual needs of a needy person, and on public welfare works such as digging of wells. It should not be used for the construction of masājid and madāris. However, the 'ulamā' permitted its use for the construction of toilets.[2]

Further reading: *Fatāwā Rahīmīyyah*, vol. 2, p. 90; *Ahsan al-Fatāwā*, vol. 7, p. 16.

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[1] *Kifāyatul Muftī*, vol. 8, p. 68.

[2] *Jadīd Fiqhī Masā'il*, vol. 1, p. 253.

Since many scholars state that it is essential to give interest money into the ownership of the poor, after it is given into his ownership, one will have to extricate himself from the difference of opinion in spending on works of this nature. It will then be unanimously permissible.

Allāh ta'ālā knows best.

Interest money for the payment of a debt

Question

Some people collect interest money to purchase blankets which are then distributed among the poor. On one occasion, they did not have interest money so they borrowed lillāh money to buy the blankets. Later on, when they received interest money, they used it to pay the loan. Is this permissible?

Answer

The fundamental ruling with regard to interest money is that it must be returned to its original owner. If the owner is not known, it must be given as charity to the poor without the intention of reward. Yes, some 'ulamā' have permitted the payment of debts of this nature with interest money. Therefore, there is room to practise on their view at the time of necessity. Nonetheless, it is better to first resort to the stratagem of ownership, and then spend it. There is more caution in this.

عن عبد الله بن مسعود رضي الله عنه أنه اشترى جارية فذهب صاحبها فتصدق بثمنها وقال: اللّٰهم عن صاحبها فإن كره فلي وعلي الغرم. (رواه البيهقي في سننه الكبرى: ١٨٨/٦، كتاب اللقطة، دار الفكر، بيروت)

الدر المختار:

فيجب رد عين الربا لو قائماً. (الدر المختار: ١٦٩/٥، سعيد)

البحر الرائق:

ويردونہ على أربابہ إن عرفوہم وإلا يتصدقوا بہ لأن سبيل الكسب الخبيث التصدق إذا تعذر الرد. (البحر الرائق: ۲۰۱/۸، فصل فى البيع، كتاب الكراہية، كوئٹة)

Fatāwā Rahīmīyyah:

Question: I am employed in a madrasah. The salary which I receive is from the interest money which is received from a bank...Should I accept this interest money or refuse it? What option do I have?

Answer: You should not accept a salary from interest money. It is impermissible. What the administration could do is take a loan from someone and pay your salary from it. They may then pay the debt with interest money. This is the leeway.[1]

Kifāyatul Muftī:

Question: Can interest money be used for religious education, public welfare works and poor Muslims?

Answer: Interest money can be collected and spent on the poor, for the fulfilment of debts of Muslims, for education (primary and Dīnī), and for all public welfare works.[2]

Nizām al-Fatāwā:

After giving it in the ownership of a poor person, it may be used for the cleaning of masjid toilets. This is how the leeway will be applied: Give the interest money to poor people who are eligible and make them owners of it. The latter will then give it as a donation to the masjid.

وقدمنا أن الحيلة أن يتصدق على الفقير، ثم يأمرہ بفعل ہذہ الأشياء. الدر المختار مع رد المحتار: ۳٤٥/۲، كتاب الزكوٰة، باب المصرف، سعيد. (نظام الفتاوىٰ: ۱۹۹/۱)

Allāh taʿālā knows best.

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[1] *Fatāwā Rahīmīyyah*, vol. 3, p. 173.

[2] *Kifāyatul Muftī*, vol. 8, p. 68.

Giving interest money to one's grandson

Question

A person has interest money. His grandson is poor. Can he give the interest money to his grandson?

Answer

It is permissible to give interest money to one's poor and needy grandson. When the owner of interest money is not known, it becomes obligatory to give it in charity. In other words, it is a charity on behalf of the owner and not from the person who is giving it. The [original] owner is a stranger with respect to the grandson of the one who is giving it.

Fatāwā Dār al-ʿUlūm Deoband:

Question: If unlawful wealth or invalid profits become accumulated by a Muslim, and it is not possible to return these amounts to their rightful owners, then to absolve himself from this tainted wealth, the jurists state that it must be given in charity. My question is: Will the recipients be only the poor and needy as is the case with normal obligatory charities or can it be given to one's parents, children and wife? Or, like zakāh, does it have to be given to outsiders?

Answer: The order to give unlawful wealth and tainted profits in charity is based on a certain principle. Namely, the owner of this wealth is unknown or it is not possible to convey it to him. This wealth then falls under the ruling of luqṯah (a lost item which has been found). And the ruling for a luqṯah is that if one has no hope of finding its owner, he must give it in charity on behalf of the owner. When the owner of unlawful wealth is unknown or it is not possible to convey it to him, then giving this wealth in charity will, like a luqṯah, be given on behalf of the owner of that wealth. This is why it becomes correct to refer to it as s̲adaqah (charity). And this is why it becomes lawful for the poor to accept it. Other than this, just as it was ẖarām for this person to consume unlawful wealth, it would have been unlawful for the poor as well. This wealth is given to the poor on behalf of the owner and not on behalf of the one who earned it unlawfully. The following texts affirm this:

وفى العشرين من بيوع الهندية... وإنما طاب للمساكين على قياس اللقطة...

Similar to the recipients of luqṯah, the poor and needy are the recipients of invalid profits and unlawful wealth which are wājib at-tas̲adduq (obligatory to be given in charity). It becomes clear that

unlawful wealth which has been classified as obligatory to be given in charity does not refer to every unlawful wealth. Rather, it only refers to that unlawful wealth whose owner is unknown or nowhere to be found, and therefore cannot be returned to him. Furthermore, in such a case, this wealth falls under the ruling of luqṭah and is given in charity on behalf of the original owner. This is why it is permissible for the poor to accept it. This wealth is not unlawful for them. It is also for this reason that it can be given to one's parents, wife and children. After all, it is not a charity from the person but on behalf of the original owner.

ان تصدق به على أبيه يكفيه ولا يشترط التصدق على الاجنبي (٣٤٩/٥). وفيه من متفرقات الغصب سئل يوسف بن محمد عن غاصب ندم على ما فعل و أراد أن يرد المال إلى صاحبه وقع له اليأس عن وجود صاحبه فتصدق بهذا العين هل يجوز للفقير أن ينتفع بهذا العين فقال: لا يجوز أن يقبله ولا يجوز له الانتفاع وإنما يجب عليه رده إلى من دفعه إليه قال: إنما أجاب بهذا الجواب زجراً لهم كيلا يتساهلوا في أموال الناس أما لو سلك الطريق في معرفة المالك فلم يجده فحكمه حكم اللقطة، كذا فى التاتارخانية. (الفتاوى الهندية: ١٥٧/٥).[1]

Allāh ta'ālā knows best.

Giving interest money to non-Muslims

Question

A person has interest money. Is it necessary to give it to poor Muslims or can it be given to non-Muslims as well?

Answer

Interest money can be given to non-Muslims but it is better to give it to a poor Muslim.

قوله وصح دفع غيرها أى وصح دفع غير الزكاة إلى الذمي واجباً كان أو تطوعاً كصدقة الفطر والكفارات والمنذور لقوله تعالىٰ: "لا ينهاكم الله عن الذين

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[1] *Fatāwā Dār al-'Ulūm Deoband*, vol. 2, pp. 383-386.

لم يقاتلوكم فى الدين" الآية، وخصت الزكاة بحديث معاذ رضي الله عنه وفيه خلاف أبي يوسف. ولا يرد عليه العشر لأن مصرفه مصرف الزكاة كما قدمناه فلا يدفع إلى ذمي والصرف فى الكل إلى فقراء المسلمين أحب، وقيد بالذمي لأن جميع الصدقات فرضاً كانت أو واجبة أو تطوعاً لا تجوز للحربي اتفاقاً كما في غاية البيان. (البحر الرائق: ٢/٢٤٢،باب المصرف، كوئته)

(وكذا فى فتاوى الشامى: ٢/٣٥١، باب المصرف، سعيد)

Fatāwā Rahīmīyyah:

Interest money can be given to the poor and needy. The latter can then use it. It is better to give it to Muslims than to non-Muslims. Muslims are more eligible.[1]

Allāh ta'ālā knows best.

Interest money to construct toilets

Question

Is it permissible to use interest money to construct toilets in a madrasah or school?

Answer

According to some muftīs, it is permissible to use interest money to construct toilets for a madrasah, school and so on.

Fatāwā Rahīmīyyah:

The issue is a contentious one. It is better to give interest money to a poor person. There is leeway to use it for the construction of roads and other public welfare works. It cannot be used for a masjid. It may be used for the construction of masjid toilets.[2]

Kifāyatul Muftī:

After receiving interest money, it could be used for public welfare works or for the fulfilment of the needs of the poor. For example, on orphans and needy people, stipends for students of madāris and assisting them to purchase books, for the construction of travellers'

[1] *Fatāwā Rahīmīyyah*, vol. 9, p. 279.

[2] *Fatāwā Rahīmīyyah*, vol. 9, p. 279.

lodges, wells, roads, lighting of roads, etc. However, it should not be spent on a masjid because it contradicts the sanctity of a masjid.[1]

Jadīd Fiqhī Masā'il:

Interest money can be given for the individual needs of a poor person and on public welfare works such as digging of wells. It should not be used for the construction of masājid and madāris. However, the 'ulamā' permitted its use for the construction of toilets.[2]

Islāmī Fiqh:

If a person is forced to deposit money in a bank and he receives interest on it, he must not use it on himself or his family. Instead, he must give it to the poor without the intention of reward. Alternatively, he may give it to a reliable person who will then use it for public welfare works such as the construction of roads, public toilets, etc.[3]

However, after resorting to the leeway of ownership, there has to be caution in using interest money for the construction of toilets.

Nizām al-Fatāwā:

After giving it in the ownership of a poor person, it may be used for the cleaning of masjid toilets. This is how the leeway will be applied: Give the interest money to poor people who are eligible and make them owners of it. The latter will then give it as a donation to the masjid.

وقدمنا أن الحيلة أن يتصدق على الفقير، ثم يأمره بفعل هذه الأشياء. الدر المختار مع رد المحتار: ٣٤٥/٢، كتاب الزكوٰة، باب المصرف، سعيد. (نظام الفتاوىٰ: ١٩٩/١)

Allāh ta'ālā knows best.

The recipient of luqṯah and usury

Question

Are the recipients of luqṯah and usury the same or are they different?

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[1] *Kifāyatul Muftī*, vol. 7, p. 105.

[2] *Jadīd Fiqhī Masā'il*, vol. 1, p. 253.

[3] *Islāmī Fiqh*, vol. 2, p. 369.

Answer

The recipients of both are more or less the same. There doesn't seem to be any difference. For example, a luqṭah can be given to poor non-Muslims. Interest money can also be given to them. The conferring of ownership is not necessary for a luqṭah. It can be used for public welfare works and the shrouding and burial of deceased persons. In the same way, some 'ulamā' are of the view that ownership is not necessary for interest money. Thus, interest and luqṭah are not wājib at-taṣadduq. At the same time, they are not wājib at-tamlīk.

الدر المختار:

ورابعها الضوائع مثل مالا يكون له أناس وارثونا

فمصرف الأولين أتى بنص و ثالثها حواه مقاتلونا

ورابعها فمصرفه جهات تساوى النفع فيها المسلمونا

قوله الضوائع: جمع ضائعة أى اللقطات... وقوله ورابعها فمصرفه جهات، موافق لما نقله ابن الضياء في شرح الغزنوية عن البزدوي من أنه يصرف إلى المرضى والزمنى واللقيط وعمارة القناطر والرباطات والثغور والمساجد وما أشبه ذلک، ولكنه مخالف لما فى الهداية والزيلعي أفاده الشرنبلالي أى فإن الذي فى الهداية وعامة الكتب أن الذي يصرف في مصالح المسلمين هو الثالث كما مر، وأما الرابع فمصرفه المشهور هو اللقيط والفقير والفقراء الذين لا أولياء لهم فيعطى منه نفقتهم وأدويتهم وكفنهم وعقل جنايتهم كما فى الزيلعى وغيره. (الدر المختار مع فتاوى الشامى: ٣٣٨/٢، باب العشر، سعيد)

المحيط البرهانى:

اللقطات والتركات تصرف إلى ما فيه صلاح المسلمين، كمال الخراج والجزية إلا أنه يجعل لها بيت على حدة، لما أنه ربما يظهر لها مستحق بعينها. وقال: الخراج والجزية تصرف إلى المقاتلة، وإلى سد ثغور المسلمين، وبناء الحصون فى

الثغور وإلى مراصد الطريق في دار الإسلام ليقع الأمن عن قطع الطريق من جهة اللصوص، وإلى كري الأنهار العظام الذي فيہ صلاح المسلمين، وإلى من فرغ نفسہ لعمل المسلمين نحو القضاة والمحتسب والمفتين والمؤذنين والمعلمين وإلى عمارة المساجد والقناطر وإلى معالجة المرضى إذا كانوا فقراء وإلى تكفين الموتى الذين لا مال لهم وما أشبہ ذلک، والحاصل: أن ہذا النوع يصرف إلى ما فيہ صلاح الدين وصلاح دار الإسلام والمسلمين. (المحيط البرہانی: ٢/٦٢٣، الفصل السابع فی تعجيل الخراج)

البحر الرائق:

والرابع اللقطات والتركات التي لا وارث لها وديات مقتول لا ولي لہ قالوا: مصرفہ اللقيط الفقير والفقراء الذين لا أولياء لهم يعطون منہ نفقتهم وأدويتهم ويكفن بہ موتاہم. (البحر الرائق: ١٢٨/٥، فصل فی الجزية، وكذا فی تبيين الحقائق: ٢٨٣/٣)

وفی الفتاوی الهندية: والرابع اللقطات ہكذا في محيط السرخسي وما أخذ من تركة الميت الذی مات ولم يترک وارثاً أو ترک زوجاً أو زوجة وہذا النوع يصرف إلى نفقة المرضى وأدويتهم وہم فقراء و إلى كفن الموتى الذين لا مال لهم. (الفتاوی الهندية: ١٩١/١، باب فی صدقة الفطر. وكذا فی مجمع الانہر فی شرح ملتقی الابحر: ٤٨٦/٢، فی تقسيم القسمة، بيروت)

Fatāwā ʿUthmānī:

It is almost unanimously accepted that tainted/filthy earning is wājib at-ta<u>s</u>adduq either because its rightful owner is unknown or it is not possible to return it to him. This is why it falls under the ruling of luq<u>t</u>ah, and the ruling for the latter is that it is wājib at-ta<u>s</u>adduq. When listing the recipients of the Bayt al-Māl, the <u>H</u>anafī jurists state that it is only the poor who are the eligible recipients of a luq<u>t</u>ah. From this, the ruling has been extracted that, like zakāh, it is essential for the recipient to take ownership of it. However, this conclusion is questionable.

Firstly, because some Hanafī jurists do not reserve a luqtah for the poor alone. Rather, they say that it can be used for all works which are of benefit to the Muslims. ʿAllāmah Shāmī rahimahullāh quotes from ʿAllāmah Bazdawī rahimahullāh:

أنه يصرف إلى المرضى والزمنى...

Ad-Durr al-Mukhtār quotes a poem from ʿAllāmah ibn ash-Shahinah which lists the recipients of the Bayt al-Māl. The same view is preferred in it. However, ʿAllāmah Shāmī rahimahullāh then makes an objection to it by stating that books of jurisprudence in general state that the poor are the recipients of a luqtah. He writes:

وأما الرابع فمصرفه المشهور هو اللقيط الفقير والفقراء الذين لا أولياء لهم فيعطى منه نفقتهم وأدويتهم وكفنهم وعقل جنايتهم.

The same statement is found in several other juridical texts on the issue of the recipient of a luqtah. However, after pondering over them, the point which we learn is that although the jurists specified the poor as the recipients for a luqtah, they did not lay down the condition of ownership. A clear proof of this is that the shrouding of a deceased poor person has been included as a beneficiary of a luqtah. Whereas, ownership is not established for the shrouding of a deceased person. We conclude from this that a luqtah can be given to the poor without ownership.[1]

Hakīmul Ummat Hadrat Thānwī rahimahullāh said that a luqtah can be used for welfare works:

A person brought a stamp to me and said: "You gave me a bundle of envelops to discard. I found this stamp in one of the envelops." I asked: "What is the ruling with regard to stamps of this nature?" He said: "This is a luqtah, and the ruling with regard to it is that if it is not possible to identify its owner, it must be given for some good welfare work." I am therefore giving it to the madrasah.[2]

Allāh taʿālā knows best.

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[1] *Fatāwā ʿUthmānī*, vol. 3, p. 136.

[2] *Ashraf al-Ahkām*, p. 197 as quoted from *Husn al-ʿAzīz*, vol. 3, p. 6.

Ownership of unlawful wealth given in charity

Question

In a non-Muslim country, it is necessary to give in charity all monies which have been acquired unlawfully, e.g. interest money. Is it necessary to give it to the poor or can it be given for other welfare works without giving it over in the ownership of the poor?

Answer

Some muftīs are of the view that wealth which has the element of filthiness and unlawfulness in it has to be given to the poor. However, other muftīs say that it can be used for public welfare works, e.g. building of toilets, construction of roads, etc. They differentiate between an obligatory charity (sadaqah wājibah) and wājib at-tasadduq (that which is obligatory to give in charity). They say that ownership by a poor person is necessary for an obligatory charity such as zakāh and sadaqatul fitr. On the other hand, if something is classified as wājib at-tasadduq, then ownership by a poor person is not necessary.

When Rasūlullāh sallallāhu ʿalayhi wa sallam reached the area which had been inhabited by the Thamūd nation, and the Sahābah used the water of those wells to make dough, he ordered them to feed the dough to the camels.

عن ابن عمر رضي الله عنه أن الناس نزلوا مع رسول الله صلى الله عليه وسلم أرض ثمود الحجر فاستقوا من بئرها واعتجنوا به فأمرهم رسول الله صلى الله عليه وسلم أن يهريقوا ما استقوا من بئرها وأن يعلفوا الإبل العجين وأمرهم أن يستقوا من البئر التي كانت تردها الناقة. (رواه البخارى: ١/٤٧٨)

Another narration states that he ordered for the dough to be thrown away. The dough had either become makrūh tahrīmī or tanzīhī. In both cases, feeding it to the camels means that when something becomes tainted and one cannot use it for one’s self, there is leeway to use it for some welfare work. Yes, alcohol has to be poured out and discarded, it cannot be owned. ʿAllāmah ʿAynī rahimahullāh quotes both views with regard to this dough, i.e. it is makrūh tahrīmī or tanzīhī.

If a wealthy person finds a luqtah, it is obligatory on him to give it in charity. He cannot use it for himself. However, the jurists permit its use for the shrouding and burial of a deceased person.

وأما الرابع فمصرفہ المشہور ہو اللقیط الفقیر والفقراء الذین لا أولیاء لہم فیعطی منہ نفقتہم وأدویتہم وکفنہم وعقل جنایتہم.

ʿAllāmah Bazdawī ra<u>h</u>imahullāh writes:

أنہ یصرف إلی المرضی والزمنی واللقیط وعمارة القناطر والرباطات والثغور والمساجد وما أشبہ ذلک. (شامی: ۲/۳۲۸، سعید)

Muftī Kifāyatullāh <u>S</u>ā<u>h</u>ib ra<u>h</u>imahullāh writes with reference to money which is deposited in a bank:

When money is deposited in a bank and interest is received for it, it must be withdrawn so that one does not get the sin of aiding the propagation of Christianity and Muslims becoming apostates. After withdrawing the interest money, it must be used for public welfare works or for the fulfilment of the needs of the poor. For example, on orphans, the needy, stipends for students of Dīnī madāris, for their textbooks, the construction of travellers' lodges, the digging of wells, the construction of roads, the lighting of streets, etc. All these avenues are permissible. However, it must not be spent on a masjid as this negates its sanctity.[1]

Further details can be found in *Fatāwā ʿUthmānī*. This also seems to be the view of <u>H</u>a<u>d</u>rat Muftī Mu<u>h</u>ammad Taqī ʿUthmānī, <u>H</u>a<u>d</u>rat Muftī Mu<u>h</u>ammad Rafīʿ ʿUthmānī and other muftīs. That is, tainted wealth is wājib at-ta<u>s</u>adduq, but it is not like obligatory charity. <u>S</u>adaqah also refers to what is not wājib at-tamlīk.

عن أبي ہریرة رضي اللہ عنہ قال: قال رسول اللہ صلی اللہ علیہ وسلم: إذا مات الإنسان انقطع عملہ إلا من ثلاث، صدقة جاریة، أو علم ینتفع بہ، أو ولد صالح یدعو لہ. (رواہ مسلم)

The word <u>s</u>adaqah is also used to refer to a waqf.

Allāh taʿālā knows best.

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[1] *Kifāyatul Muftī*, vol. 8, p. 67.

Making profit from unlawful wealth

<u>Question</u>

A person gave R1000 to a person and collected R1500 from him. The R500 is wājib at-tasadduq. However, he mistakenly spent the R500 in some business and made R1000 from it. Now is this additional R500 also wājib at-tasadduq or can he keep it and spend it?

<u>Answer</u>

A person pointed to unlawful wealth and bought something with it. The thing to which he pointed was paid with unlawful wealth. The income of it is impermissible and it is wājib at-tasadduq. However, if he bought some unlawful item without pointing to it, or, he pointed to the unlawful item but paid it with lawful wealth, then Imām Abul Hasan Karkhī rahimahullāh is of the view that the profit acquired from it will be lawful. Only the original unlawful wealth will be wājib at-tasadduq.

Nonetheless, this does not mean that unlawful wealth should be made a means for earning and making profits. It is totally forbidden to do this. Yes, if a person does it mistakenly, then the ruling will be as stated by Imām Karkhī rahimahullāh.

<u>الدر المختار مع رد المحتار:</u>

اكتسب حراماً واشترى به أو بالدراهم المغصوبة شيئاً، قال الكرخى: إن نقد قبل البيع تصدق بالربح وإلا لا وفي رد المحتار: (قوله اكتسب حراماً، الخ) توضيح المسألة ما فى التاتارخانية حيث قال: رجل اكتسب مالاً من حرام ثم اشترى فهذا على خمسة أوجه إما أن دفع تلك الدراهم إلى البائع أولاً ثم اشترى منه بها أو اشترى قبل الدفع بها ودفعها أو اشترى قبل الدفع بها ودفع غيرها أو اشترى مطلقاً ودفع تلك الدراهم أو اشترى بدراهم آخر ودفع تلك الدراهم،... قال الكرخى فى الوجه الأول والثاني لا يطيب، وفى الثلاث الأخيرة يطيب، وقال أبو بكر: لا يطيب فى الكل لكن الفتوىٰ الآن على قول الكرخي دفعاً للحرج عن الناس. وفى الوالواجية: وقال بعضهم: لا يطيب فى الوجوه كلها وهو

المختار ولكن الفتوىٰ اليوم على قول الكرخي دفعاً للحرج لكثرة الحرام. (الدر المختار مع رد المحتار: ٥/٢٣٥، سعيد)

لو تصرف فى المغصوب والوديعة بأن باعه وربح فيه إذا كان ذلك متعيناً بالإشارة أو بالشراء بدراهم الوديعة أو الغصب ونقدها يتصدق بربح حصل فيهما إذا كانا مما يتعين بالإشارة وإن كانا مما لا يتعين فعلى أربعة أوجه فإن أشار إليها ونقدها فكذلك يتصدق وإن أشار إليها ونقد غيرها أو أشار إلى غيرها ونقدها أو أطلق ولم يشر ونقدها لا يتصدق فى الصور الثلاث عند الكرخي قيل: وبه يفتىٰ. (الدر المختار: ٦/١٨٩، سعيد)

وكذا في حاشية الطحطاوي على الدر المختار وزاد بقوله: والمختار أنه لا يحل مطلقاً كذا فى الملتقى ولو بعد الضمان هو الصحيح كما في فتاوى نوازل واختار بعضهم الفتوىٰ على قول الكرخي في زماننا لكثرة الحرام وهذا كله على قولهما وعند أبي يوسف لا يتصدق بشيء منه كما لو اختلف الجنس ذكره الزيلعي. (حاشية الطحطاوى على الدر المختار: ٤/١٠٥)

To sum up, the R500 which was acquired as a profit is not wājib at-taṣadduq. It can be used. However, one should not do this in the future because unlawful wealth must be given in charity immediately.

Allāh taʿālā knows best.

Giving as charity an amount which is different from the interest money

Question

A person has an amount of money in a British bank and he receives interest for it. He has some other money with him, and he wants to give it in charity in lieu of the interest which is being added to his account in Britain. Will he absolve himself in this way or is it necessary for him to withdraw exactly that amount of interest from the British bank and give it in charity?

Answer

It is preferable and better to give the same money in charity. However, if the person wants to free himself from the interest money, and

therefore gives into charity some other money, he will absolve himself of his responsibility. This is because notes are not identifiable specifically. Furthermore, banking institutions do not pay the interest separately; they merely add it to the original amount which was deposited. It is therefore impossible to distinguish the original money from the interest money.

الدر المختار مع رد المحتار:

لو خلط السلطان المال المغصوب بماله ملكه، لأن الخلط استهلاك إذا لم يمكن تميزه عند أبي حنيفة، وقوله أرفق، إذ قلما يخلو مال عن غصب. وفى الشامية: قوله لأن الخلط استهلاک، أى بمنزلة من حيث أن حق الغير يتعلق بالذمة، لا بالأعيان،...لأنا نقول: إنه لما خلطها ملكها، وصار مثلها ديناً في ذمته، لا عينها. (الدر المختار مع رد المحتار: ۲۹۰/۲، مطلب فيما لو صادر السلطان جائزاً، سعيد)

الفتاوى البزازية:

ما يأخذه الأعونة من الأموال ظلماً ويخلطه بماله وبمال مظلوم آخر يصير ملكاً له وينقطع حق الأول فلا يكون أخذه عندنا حراماً محضاً نعم لا يباح الانتفاع به قبل أداء البدل فى الصحيح من المذهب. (الفتاوى البزازية على هامش الهندية، قبيل كتاب الزكاة، ٨٣/٤)

(وكذا فى فتاوى الشامى: ۲۹۲/۲، مطلب فى التصدق من المال الحرام، سعيد)

A clear example for this issue is when collectors are appointed by the madāris to go around collecting donations for the madrasah. Quite often, they cannot return immediately after collecting the donations. Consequently, the 'ulamā' have permitted that if a collector cannot reach the madrasah while the latter needs the money immediately, he may inform his family to give a certain amount of money from his own money. The 'ulamā' state that since he has paid the madrasah from his personal money, he would have absolved himself from his responsibility. It will be totally permissible for him to use the zakāh money [which he had collected] for himself.

The sending of zakāh monies from one country to another is a common practice. Here too, the same currency of the receiving country is not given. Rather, it is exchanged. For example, zakāh containing rands, pounds or dollars is distributed among the poor of India and Pakistan in rupees. Refer to *Fatāwā Dār al-ʿUlūm Zakarīyyā*, vol. 3, p. 193.

To sum up, it is not good to pay interest from one's pure money. Once the interest is withdrawn, it must be handed over immediately to the poor. Also, it is not permissible to deposit money in a bank with the intention of earning interest.

Allāh taʿālā knows best.

Changing interest money for an item

Question

A person buys certain items with interest money and gives them to a poor person. Is this permissible? For example, he bought a sewing machine with interest money and gave it to a poor person. Is it necessary to give the actual interest money to the poor without intention of reward, or is it permissible to buy something and give it to him?

Answer

The point which we gauge from the writings of the jurists is that it is necessary to convey the original wealth to the poor. When the original owner is unknown, the original amount or item has to be given in charity. It is not permissible to change it.

فتاوى الشامى:

فيجب رد عين الربا لو قائماً لا رد ضمانه يعني إنما يجب رد ضمانه لو استهلكه. (فتاوى الشامى: ١٦٩/٥، باب الربا، سعيد)

(ويجب رد عين المغصوب) لقوله عليه السلام على اليد ما أخذت حتى ترد ولقوله عليه السلام "لا يحل لأحدكم أن يأخذ مال أخيه لاعباً ولا جاداً، وإن أخذه فليرده عليه، زيلعي، وظاهره أن رد العين هو الواجب الأصلي هو الصحيح. (فتاوى الشامى: ١٨٤/٦، كتاب الغصب، سعيد)

فتح القدير:

قال إذا تغيرت العين المغصوبة بفعل الغاصب حتى زال اسمها وعظم منافعها زال ملك المغصوب منه عنها وملكها الغاصب وضمنها ولا يحل له الانتفاع بها حتى يؤدى بدلها وقال:...فإن موجب أصل الغصب إنما هو رد العين ولا يصار إلى رد المثل أو القيمة إلا بعد هلاک العين فلم يكن رد المثل أو القيمة إلا بعد هلاک العين. (فتح القدير مع الهداية: ٣٣٢/٩، دار الفكر)

(قوله وإنما الذي يجب حقاً للشرع) قال بعض الفضلاء: قد علمت أن العقد المذكور تعلق بسببه حقان حق العبد وهو رد عينه إن كان باقياً ورد ضمانه إن مستهلكاً وحق الشرع وهو رد عينه بنقض العقد السابق المنهي عنه شرعاً. (منحة الخالق على هامش البحر الرائق: ١٢٥/٦، باب الربا، كوئته)

Allāh taʿālā knows best.

Paying traffic fines with interest money

Question

Can interest money be used to pay traffic fines?

Answer

It is necessary to obey those laws of the government which are not in conflict with the Sharīʿah. Yes, if they are oppressive or against the Sharīʿah, then a person must not obey them. The laws which apply to roads and highways are promulgated for the safety and ease of people. It will therefore be necessary to abide by them. If a person commits an offence and the police stop him and fine him, it will be a valid fine and it is not permissible to pay it with interest money. Yes, if the police overcharges, then one may pay the fine from the interest which was received from a government bank. It is not permissible to give interest which was collected from a private bank for the payment of a government fine.

وتجب طاعة الإمام عادلاً كان أو جائراً إذا لم يخالف الشرع. (فتاوى الشامى: ٢٦٣/٤، سعيد)

Fatāwā Maḫmūdīyyah:

When a person lives under a government, he is legally obliged to obey its laws. If he breaks the law, he will be committing an offence.[1]

(قوله عن طاعته)... ومثله ما ذكره عن الدرر وجهه أنه إذا لم يكن كذلك يكون عاجزاً أو جائراً ظالماً يجوز الخروج عليه. (فتاوى الشامى: ٢٦٤/٤، سعيد)

Allāh taʿālā knows best.

Paying for service charges with interest money

Question

Is it permissible to pay a bank's service charges with interest money? A bank generally has a monthly service charge. This charge is applied proportionately to its creditors and debtors. It is normally used to pay the bank's directors, workers, guards, etc.

Answer

Bank workers are responsible for accounts, protection, safeguarding and so on. They are paid by the bank. Those who deposit their money in the bank or take loans from banks, get together to pay the workers. The fundamental issue is one of need. Those who are in need of this work will have to be paid. After looking at the issue deeply, we conclude that the need is on both sides. The bank is in need in the sense that it trades with people's money and makes a profit from it. Depositors are also in need because their monies are protected. They can withdraw their money whenever they want. Because of their need, they presented themselves at the bank; the bank did not extend an invitation to them. The service charge of the bank is therefore valid and it is not permissible to pay for it with interest money. If not, it will entail deriving benefits from interest money. And the Sharīʿah does not permit deriving any benefit from usury. Exercising caution on this issue is essential.

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[1] *Fatāwā Maḫmūdīyyah*, vol. 16, p. 148.

الهداية:

وأجرة الكيال وناقد الثمن على البائع أما الكيل فلا بد منه للتسليم و هو على البائع و معنى هذا إذا بيع مكايلة، وكذا أجرة الوزان والزراع والعداد، وأما النقد فالمذكور رواية ابن رستم عن محمد لأن النقد يكون بعد التسليم، ألا ترى أنه يكون بعد الوزن والبائع هو المحتاج إليه ليميز ما تعلق به حقه من غيره أو ليعرف المعيب ليرده، وفي رواية ابن سماعة عنه على المشترى لأنه يحتاج إلى تسليم الجيد المقدر، والجودة تعرف بالنقد كما يعرف القدر بالوزن فيكون عليه وأجرة وزان الثمن على المشتري لما بينا أنه هو المحتاج إلى تسليم الثمن وبالوزن يتحقق التسليم. (الهداية: ٢٩/٣)

(وكذا فى الفتاوى الهندية: ٢٨/٣، الفصل السادس فيما يلزم المتعاقدين من المؤنة فى تسليم المبيع والثمن. والمحيط البرهانى، الفصل الثالث فى قبض المبيع بإذن البائع، ٢٧١/٦. والبحر الرائق: ٣٠٦/٥، كتاب البيوع. وكذا فى مجمع الانهر شرح ملتقى الابحر: ٣١/٣، دار الكتب العلمية، بيروت)

بحوث فى قضايا فقهية معاصرة:

لا مانع شرعاً من أن يطالب البنک مستقرضيه بأداء مبلغ مقابل التكلفات الإدارية التي تحملها في تقويم المشروعات، ومتابعة تنفيذها، ما دام ذلک المبلغ لا يجاوز التكلفات الفعلية الواقعة في ذلک المشروع خاصة، فإن كان من الممكن تحديد هذه التكلفات بدقة، فهو الأنسب الأوفق بأحكام الشرعية، فإنه لا غبار على جوازه... ما دامت هذه العمولة لا تجاوز أجر المثل على مثل هذه الأعمال، فإن الذي لا يجوز مطالبة الربح أو الأجر عليه، هو عمل القرض بنفسه، أما الأعمال الإدارية بالنسبة لذلک القرض، فلا يجب شرعاً أن تكون مجانية...

ونظير ذلک ما ذکره الفقهاء أن القاضي والمفتي لا يسع لهما مطالبة الأجر من الخصم، أو المستفتي، ولکن يجوز لهما أن يطالبه بأجرة کتابة الفتویٰ، أو کتابة الوثائق، والمحاضر والسجلات، ما دامت ہذه الأجرة لا تجاوز أجر المثل علی مثل ہذه الأعمال، ولا تتخذ حيلة لاکتساب الأجرة علی الإفتاء والقضاء نفسہا.

وجاء فی الدر المختار للحصکفی: يستحق القاضی الأجر علی کتب الوثائق، والمحاضر، والسجلات قدر ما يجوز لغيره کالمفتي، فإنہ يستحق أجر المثل علی کتابة الفتویٰ لأن الواجب عليہ الجواب باللسان دون الکتابة بالبنان، ومع ہذا الکف أولیٰ، احترازاً عن القيل والقال، وصيانة لماء الوجہ عن الابتذال.

ويقول العلامة ابن عابدين تحتہ:

قال فی جامع الفصولين: للقاضي أن يأخذ ما يجوز لغيره، وما قيل في کل ألف خمسة دراہم، لا نقول بہ، ولا يليق ذلک بالفقہ، وأی مشقة للکاتب في کثرة الثمن؟ وإنما أجر مثلہ بقدر مشقتہ أو بقدر عملہ في صنعتہ أيضاً کحکاک، وثقاب يستاجر بأجر کثير في مشقة قليلة، وقال بعض الفضلاء: أفہم ذلک جواز أخذ الأجرة الزائدة، وإن کان العمل مشقتہ قليلة ونظرہم لمنفعة المکتوب لہ، قلت: ولا يخرج ذلک عن أجرة مثلہ فإن من تفرغ لہذا العمل، کثقاب اللآلي مثلاً لا يأخذ الأجر علی قدر مشقتہ، فإنہ بمؤنتہ، ولو ألزمناه ذلک لزم ضياع ہذه الصنعة، فکان ذلک أجر مثلہ. (رد المحتار: ٩٢/٦، کتاب الاجارة، مسائل شتیٰ، سعيد). (بحوث فی قضايا فقہية معاصرة: ٢٠٤/١-٢٠٦)

From the above-quoted texts it seems that it is permissible to collect service fees from a debtor, however, the same reason is found for a person wanting a loan. A bank bears the expenses of safeguarding, accounting and other arrangements. It is not necessary that it must bear all this for free. Rather, it may levy appropriate charges from its depositors for the safety of their monies. Thus, I do not see any reason

to say that these charges are impermissible. Since a service charge is valid, it will be impermissible to use interest money to pay for it.

هذا ما عندي إن كان الصواب فمن الله وإن كان الخطأ فمني ومن الشيطان.

"ولعل الله يحدث بعد ذلک أمرا."

Allāh taʿālā knows best.

Giving interest money as a bribe

Question

A person needs a certain task to be done and has to pay a bribe for it. Can he use interest money to pay it?

Answer

It is not permissible to use interest money to pay a bribe. The person will be committing a double sin; one for using interest money and the other for bribery.

Āp Ke Masā'il Aur Oen Kā Hull:

Question: Usury is harām and so is bribery. How is it to spend a harām on something which is harām? What I mean is that is it permissible to use interest money to pay a bribe?

Answer: A person will be committing two sins; accepting interest money and giving a bribe.[1]

Mahmūd al-Fatāwā:

Question: If a person wants to construct houses on agricultural land, the government imposes something called NA. The government and the officers who are in charge cause us immense inconvenience and stress. The government charges a certain amount to obtain an NA and the officers demand bribes. Can interest money be given for these two [NA and bribes]?

Answer: Whatever amount the government collects as NA can be paid with interest money if the latter is received from a government bank. However, the interest money cannot be given to the officers as bribery because that money does not go to the government.[2]

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[1] *Āp Ke Masā'il Aur Oen Kā Hull*, vol. 6, p. 242.

[2] *Mahmūd al-Fatāwā*, vol. 3, p. 72.

Allāh taʿālā knows best.

INSURANCE

Medical aid

<u>Question</u>

Is medical aid permissible?

<u>Answer</u>

The medical aid schemes which are in vogue in non-Muslim countries ought to be permissible as an ijārah contract. The essence of this contract is that one party gives a specified amount while the other party bears the responsibility of the medical treatment. There are two parallels to this:

1. It is a common practice in the villages, towns and cities of India and Pakistan for barbers, ironmongers, carpenters, etc. to take the responsibility of carrying out work for people. With the maturing of crops, the people give them some of the crop or some cash money. This practice was common in Afghanistan, India, Deoband, Thānah Bhawan, Sahāranpūr and other places. The barber took the responsibility of setting right the hair of members of a family. This responsibility is unspecified (majhūl) but not a cause of disputes. When the crops mature, the people give him some of the grain or some cash money. In a medical aid, one party takes the responsibility of medical treatment. In both scenarios, there is ignorance with regard to the actual work, but it is not a cause of dispute.

It is stated in *al-Hidāyah* that if a person appoints another as a representative by saying: "Try and effect a reconciliation on my behalf with respect to a murder," and the representative is successful in this, then the representative is not obliged to pay the amount for the reconciliation. However, if the representative accepted the responsibility of paying the amount, it will be obligatory on him. The author of *al-Hidāyah* then writes:

لأنه حينئذ مواخذ بعقد الضمان. (الهداية: ٣\٢٥٠، باب التبرع بالصلح والتوكيل به)

2. It is unanimously permitted to hire a wet-nurse. Here too, one party takes the responsibility of suckling an infant while the other party pays a wage for it. The times when the child will be fed are unknown, but this ignorance is not a cause of dispute. It is therefore permitted by all scholars.

Objection: The one who takes the responsibility of the medical treatment – is he one specific hired person (ajīr khās̱) or is he shared by others (ajīr mushtarak)? If he is a specific person, how does he take the responsibility for other people? Because an exclusively hired person does not work for others.

والخاص لا يمكنه أن يعمل لغيره لأن منافعه فى المدة صارت مستحقة للمستأجر والأجر مقابل بالمنافع. (فتاوى الشامى: ٦/٦٤، باب ضمان الاجير، سعيد)

If he is shared by others, he will only be eligible for payment when he does the work. On the other hand, in a medical aid, he receives payment even if he did not do any work for that month.

Answer (1): Some jurists have combined an ajīr khās̱ and ajīr mushtarak in certain situations. For example, if a wet nurse suckles infants at her house, she is an ajīr khās̱ and ajīr mushtarak. In other words, she receives payment for suckling even though she suckles other infants.

والحاصل أن المسائل فى الظئر تعارضت فمنها ما يدل على أنها في معنى أجير الوحد كقولهم لعدم الضمان فى هذه، ومنها ما يدل على أنها في معنى المشترك كقولهم إنها تستحق الأجر على الفريقين إذا أجرت نفسها لهما، قال الاتقاني: والصحيح أنه إن دفع الولد إليها لترضعه فهي أجير مشترك وإن حملها إلى منزله فهي أجير وحد وقال فى العناية: وذكر فى الذخيرة ما يدل على أنها يجوز أن تكون خاصاً ومشتركاً حتى لو أجرت نفسها لغيره استحقت الأجر على الفريقين كاملاً عملاً بشبه الأجير المشترك وتأثم نظراً إلى أن لها شبهاً بالأجير الخاص. (فتح المعين: ٣/٢٥٤، وكذا فى فتاوى الشامى: ٦/٧١، سعيد)

أقول: ويرتفع الإثم إذا كان الإذن بالعمل للغير.

In the same way, a medical aid may treat a person or it may not because he did not need treatment in a certain month. Like an ajīr khās̱, the medical aid will be eligible for payment and it can accept work from others.

Answer (2): We move away from the issue of ijārah. The second answer which could be given is that in an ʿaqd-e-muwālāt (agreement of patronage), the jurists say that if a lower maulā (patron) commits a crime, the higher maulā will have to pay the blood money. If the lower maulā passes away, the higher maulā will receive inheritance. Whereas, even if a lower maulā never commits a crime, the higher maulā will still receive inheritance because he took the ʿaqd-e-ḏamān (contract of guarantee).

الدر المختار:

(أسلم رجل) مكلف (على يد آخر و والاه أو) والى (غيره) الشرط كونه عجمياً لامسلماً على ما مر وسيجيء (على أن يرثه) إذا مات (ويعقل عنه) إذا جنى (صح) هذا العقد (وعقله عليه وإرثه له). (الدر المختار: ١٢٦/٦، فصل فى ولاء الموالات، سعيد)

حاشية الطحطاوى على الدر المختار:

قال إبراهيم النخعي: إذا أسلم الرجل على يدى رجل ووالاه فإنه يرثه ويعقل عنه وهذا قول علمائنا الثلاثة. (حاشية الطحطاوى على الدر المختار: ٧٠/٤، كوئته)

In this way, even the objection that the person who deposited money in a medical aid did not fall ill in that month is also repudiated.

The gist of the answer is that the company collects a monthly amount because of the ʿaqd-e-ḏamān even if the client does not fall ill. It is still permissible for it to collect this amount as mentioned in ʿaqd-e-muwālāt that despite not committing a crime, the maulā receives inheritance. And the jurists said that it is permissible to accept the inheritance.

From among the Urdu fatāwā, Maulānā Muftī Rashīd Aẖmad Ludhyānwī Ṣāẖib raẖimahullāh presents a short reply on the impermissibility of medical aid. The text is quoted from *Aẖsan al-Fatāwā*:

Question: In America, medical treatments and medical facilities are provided by private institutions...

Answer: It is not permissible. Allāh taʻālā knows best.[1]

It is possible that Hadrat Muftī Sāhib stated that it is impermissible because the nature of the work is unknown. There are other places where he says that ignorance of the nature of the work is permissible if it does not lead to dispute. He says with reference to the payment for making rotīs: (1) The payment becomes due on account of the work. (2) The payment is unknown. The answer to the other objection is that if ignorance with regard to the amount of payment does not lead to dispute, it does not invalidate the agreement. Most jurists have noted this.

وأما شرائط الصحة ومنها أن يكون المعقود عليه وهو المنفعة معلوماً علماً يمنع المنازعة فإن كان مجهولاً جهالة مفضية إلى المنزاعة يمنع صحة العقد وإلا فلا. (الفتاوى الهندية: ٤/٤١١)

Hadrat ʻAllāmah Anwar Shāh Kashmīrī rahimahullāh makes a valuable point:

إن الناس يعاملون في أشياء تكون جائزة فيما بينهم على طريق المروءة والإغماض، فإذا رفعت إلى القضاء يحكم عليها بعدم الجواز، فالاستقراض المذكور "أى استقراض البعير" عند عدم المنزاعة جائز عندي، وذلك لأن العقود على نحوين: نحو: يكون معصية في نفسه وذا لا يجوز مطلقاً، ونحو آخر: لا يكون معصية وإنما يحكم عليه بعدم الجواز لإفضائه إلى المنازعة فإذا لم تقع فيه منازعة جاز. (فيض البارى: ٣/٢٨٩، كتاب الوكالة)

The gist of the above text is that when a transaction does not entail sin, then ignorance alone cannot be cause of invalidity unless it causes dispute.

ʻAlī Ahmad an-Nadwī states:

[1] *Ahsan al-Fatāwā*, vol. 7, p.25.

الجهالة ليست بمانعة لذاتها، بل لكونها مفضية إلى النزاع، وہذا أصل مهم ينبغى التعويل عليہ فى الأحكام، فإن بہ حل كثير من المشكلات، وليعلم أن أحكام المعاملات الشرعية مبنية على أصلين عادلين:

الأول: منع كل ما فيہ ظلم وأكل لأموال الناس بالباطل.

الثاني: منع ما يؤدي إلى الاختلاف والنزاع بسبب الجهالة، فإذا انتفى ما يؤدي إلى الظلم والنزاع بسبب الجهالة، صح التعامل، والعرف أصل عظيم يرجع إليہ في ذلک بعد الشرع. (جمهرة القواعد الفقهية فى المعاملات المالية: ٣١٩/١، تحت القاعدة: الجهالة انما توجب الفساد اذا كانت مفضية الى النزاع المشكل)

Hadrat Muftī Walī Hasan Sāhib rahimahullāh states:

A general principle is that an ignorance which is a cause of dispute is prohibited, while the one which does not cause a dispute is not prohibited.[1]

Nowadays there are certain forms which are similar to medical aid, and which people are adopting and practising. For example, making an agreement with a security company whereby it is paid a monthly amount to see to the security needs of a person or business. If a vehicle is stolen, the security company is able to track it down or make radio announcements. It then tries to retrieve the vehicle from the thieves. Here too, the security or services which are received in exchange for the monthly payment are unknown. Sometimes years go by without the security company having to track the person's vehicle. Since this agreement does not cause a dispute, it is permissible. A medical aid can be understood in the same light.

Another angle to medical aid schemes is that some of these companies are not commercial enterprises. They make profits only as much as are required for the payment of their staff, and they consider their services to be voluntary and humanitarian. It is probably stated in their rules that they operate on mutual assistance. We could therefore include this as a preconditioned donation (tabarru'-e-mashrūt). The company renders help and assistance, and it is given some money in

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[1] *Dars al-Hidāyah*, part three, p. 29.

exchange for it. The jurists state that a preconditioned donation is permissible.

There is a detailed question in *Imdād al-Ahkām*. The gist of it is: A company makes an agreement with a retail business: “If you buy goods to the value of ten thousand from our company, you will receive three hundred rupees as a discount. But if you buy from any other company which is similar to ours, even once, you will not get this discount.” Is it permissible to lay down this condition?

This agreement is permissible because the commission which the buyer receives at the end of the year is a donation from the seller. The right of the buyer is not critical, and it is permissible to precondition a donation.[1]

The following is stated in another place:

Question: Is it permissible to collect admission fees and monthly fees from students of madāris?

Answer: It is permissible because it is not a wage but a donation, and it is permissible to lay down a condition in a donation. It does not entail compulsion because if a student does not accept the condition, he has the right of not admitting himself into the madrasah.

ودليله أنه صلى الله عليه وسلم قال لمن أضافه وعائشة رضى الله تعالىٰ عنها قال: لا، قال: فلا إذن حتى قال فى الثالثة: وعائشة رضى الله تعالىٰ عنها، قال: نعم. (امداد الاحكام: ٦٠٦/٣)

The crux of the question is that how can admission fees be permissible because it is not a payment for the education? Education fees are charged separately. The crux of the answer is that it is tabarruʻ-e-mashrūt, viz. our giving you admission is preconditioned with a donation. This does not entail compulsion because the child’s father has the right of not admitting his child in the madrasah in the first place.

Hadrat Abū Bakr radiyallāhu ʻanhu bought a palanquin for a camel from Hadrat ʻĀzib radiyallāhu ʻanhu and said to him: “Tell your son, Barrā’, to take this palanquin with me.” Hadrat ʻĀzib radiyallāhu ʻanhu said: “He will take it on condition that you relate the story of the Hijrah.” Hadrat ʻĀzib radiyallāhu ʻanhu preconditioned the favour of

[1] *Imdād al-Ahkām*, vol. 3, p. 386.

carrying the palanquin with relating the story of the Hijrah, and Hadrat Abū Bakr radiyallāhu ʿanhu accepted the condition of relating the story.

عن البراء رضي الله عنه قال: اشترى أبو بكر رضي الله عنه من عازب رضي الله عنه رحلاً بثلاثة عشر درهماً، فقال أبو بكر رضي الله عنه لعازب رضي الله عنه: مر البراء فليحمل إلي رحلي، فقال عازب رضي الله عنه لا، حتى تحدثنا كيف صنعت أنت و رسول الله صلى الله عليه وسلم حين خرجتما من مكة. (رواه البخارى: ١/٥١٥، مناقب المهاجرين)

This refers to a preconditioned donation which is permissible according to the Sharīʿah. Similarly, the responsibility of medical treatment in a medical aid is preconditioned by a donation.

In short, whether you include it as an ijārah agreement or a tabarruʿ-e-mashrūt, both transactions are permissible. Neither of the two is impermissible.

Objection: Whether you refer to it as an ijārah or tabarruʿ bi al-ʿiwad, in both cases, the overriding feeling is that medical aid companies are involved in usurious transactions or accept interest from banks. What, then, is the ruling with regard to a medical treatment which contains the element of usury?

Answer: In non-Muslim countries, the medical aid companies are generally owned by non-Muslims. There are three views with regard to doing business with non-Muslims:

1. Imām Zufar rahimahullāh says that the ruling of invalidity will be applied to whatever dealings a harbī does in a dār al-harb which are against the Sharīʿah. This, notwithstanding the fact that a harbī, due to the absence of governorship over him, and a dhimmī, due to the covenant with him, will not be interfered with. Thus, whatever wealth a non-Muslim acquires through impermissible means – whether through interest, gambling or sale of alcohol – it is not lawful for a Muslim to accept it.

2. Imām Abū Yūsuf and Imām Muhammad rahimahullāh are of the view that if a harbī does transactions which are against the Sharīʿah in a dār al-harb, then they are not invalid. This is because he has not imposed adherence to the laws of Islam on himself. Yes, a dhimmī who lives in a Muslim country – Islamic injunctions will be applied to his transactions. If his transactions are against the unanimous laws of

Islam, they will be classified as invalid. Subsequently, the money which he acquires will not be lawful for Muslims. If he acquires interest money, it will not be lawful for Muslims.

3. Imām Abū H̲anīfah rah̲imahullāh is of the view that non-Muslims – whether living in dār al-h̲arb or dār al-Islam – are not obliged to adhere to Islamic laws without their pledging to do so. Non-Muslims living in a dār al-h̲arb are far from adhering to Islamic laws. As for non-Muslim dhimmīs living in dār al-Islam, they have not imposed on themselves those laws which are against their religion, creed or law. Nor did they impose Islamic laws on themselves. Therefore, we cannot classify as invalid their transactions which are against the Sharīʿah. It will be lawful for Muslims to accept their earnings. Yes, if dhimmīs sign a written agreement with Muslims or accept such a condition whereby if they do anything which is against Islamic law, then it will be classified as invalid. In such a case, it will be unlawful for Muslims to accept it. Non-Muslims living in non-Muslim countries are like h̲arbīs. Therefore, their transactions which are in line with their laws will not be classified as invalid. It will be permissible for Muslims to accept the profits which they [non-Muslims] accrue from their transactions. H̲ad̲rat Maulānā Z̲afar Ah̲mad ʿUthmānī S̲āh̲ib rah̲imahullāh has shed a detailed light on this issue in *Imdād al-Ah̲kām*, and this fatwā was reviewed by H̲ad̲rat Thānwī rah̲imahullāh.

We gauge from the text of *Imdād al-Ah̲kām* that Maulānā Z̲afar Ah̲mad ʿUthmānī S̲āh̲ib rah̲imahullāh issued his fatwā on the view of Imām Abū H̲anīfah rah̲imahullāh.

The gist of his answer is:

Although non-Muslims are addressees of subsidiary matters as regards punishments and transactions, a general address is insufficient to classify their transactions as unlawful and invalid. Rather, adherence is also a prerequisite. H̲arbīs do not adhere at all to Islamic laws, whether the latter are in line with their beliefs or not. Therefore, no matter how they earn their wealth – whether through usury, usurping, invalid transactions, in line with their religion or not – their wealth will be included and absorbed into their country. It is permissible for Muslims to accept their money as a wage.[1]

However, from a text of *al-Hidāyah*, we learn that Muslims and non-Muslims are equal as regards interest transactions. In other words, interest transactions are prohibited to both. Therefore, if the majority

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[1] *Imdād al-Ah̲kām*, vol. 4, p. 390.

portion or all the wealth of a medical aid company is made up of interest, then one should abstain from taking assistance from such a company. Yes, if its major income in lawful, there will be no objection to deriving benefit from it and accepting medical treatment from it.

الهداية:

والربا مستثنئ عن عقودهم لقوله عليه السلام: ألا من أربى فليس بيننا وبينه عهد. (الهداية: ٢/٣٣٨)

The answer to the above text was given in detail in the chapter on the disbursement of usury. Refer to it.

امداد الفتاوىٰ:

إن كان غالب مال المهدى من الحلال لا باس بأن يقبل الهدية ويأكل ما لم يتبين عنده أنه حرام لأن أموال الناس لا تخلو عن قليل حرام فيعتبر الغالب، وإذا مات عامل من عمال السلطان وأوصى أن يعطى الحنطة للفقراء قالوا: إن كان ما أخذه من أموال الناس مختلطاً بماله لا بأس به وإن كان غير مختلط لا يجوز للفقراء أن يأخذوه إذا علموا أنه مال الغير وإن لم يعلم الآخذ أنه من ماله أو مال غيره فهو حلال حتى يتبين أنه حرام. (امداد الفتاوىٰ بحواله قاضيخان: ٣/٤٩٤)

We learn from the above texts that if halāl is more than harām, there is no objection to entering into an agreement with it and accepting medical treatment from it. Yes, if the harām is more, and it is a Muslim company, then it will be unlawful to enter into an agreement with it.

Allāh ta'ālā knows best.

Receiving money from a medical aid company

Question

One form of medical aid is where the patient receives money directly from the company and he then uses it for his medical treatment on his own. Is this permissible?

Answer

This is totally unlawful. That is, to receive money from the medical aid. This is because the amount which the person will receive will inevitably be more than what he had paid into the medical aid scheme. The extra amount which he receives is not in return for anything. Rather, it is an amount which has been added to the person's contribution. This will be unequivocal usury, and therefore unlawful.

التعريفات:

الربا هو فى اللغة: الزيادة، وفى الشرع: هو فضل خال عن عوض شرط لأحد العاقدين. (التعريفات للجرجانى، ص ١١٢)

اعلاء السنن:

الفضل المشروط فى القرض ربا محرم لا يجوز للمسلم من أخيه المسلم أبداً، لإجماع المجتهدين على حرمته. (اعلاء السنن: ٥١٨/١٤، ادارة القرآن)

حجة الله البالغة:

الربا هو القرض على أن يؤدى إليه أكثر وأفضل مما أخذ. (حجة الله البالغة: ٢٨٢/٢، قديمى)

A person should not collect any money from the company for his medical treatment. Instead, the company should take the responsibility of his treatment in return for the money which he contributes. In such a case, the company will be providing him with medical treatments in return for the monies which he paid to the company. Although the return of the amount is unknown, because this ignorance does not lead to dispute, and people enter into such agreements notwithstanding the unknown, it will be permissible.

At the same time, it should be borne in mind that some 'ulamā' prohibit this as well, and say that it is unlawful. Therefore, as a precaution, a person should not enter into such an agreement. Although there is room for permissibility, these companies engage in usurious transactions. In such a case, a person will certainly be committing the offence of supporting these companies. For proofs on this issue, refer to the previous detailed fatwā on medical aid.

Allāh ta'ālā knows best.

Collecting fees from a medical aid company

Question

Is medical aid permissible? If it is not permissible, doctors collect their fees from the medical aid companies. What is the ruling in this regard?

Answer

You pay contributions to a medical aid and receive medical treatment in exchange for it. You do not receive the money directly. This is permissible. When doctors treat a patient, they may collect their fees from the medical aid company. There is no objection to it because they are receiving a payment for their work. Yes, if the major portion of a medical aid company's income is harām, it will be necessary to abstain from it.

Fatāwā Mahmūdīyyah:

A doctor charges a consultation fee. This is permissible. He may spend this income as he likes.[1]

Allāh ta'ālā knows best.

Left-over medicine of a medical aid company

Question

A person has a medical aid. Is it permissible for him to obtain medicine for his sick brother through this medical aid? Also, he obtained medicine from the medical aid company for himself. He has some left-over. Can he give it to someone else?

Answer

If a person received medicine through his medical aid and some of it is left-over, and there is no rule stating that he has to return it, then it will be permissible for him to give it to someone else. However, if he uses his name to obtain medicine for someone else, then this is deception and cheating. It is unlawful. Yes, if the medical aid company permits the person to obtain medication for his wife, children or parents, it will be permissible for him to do this.

Allāh ta'ālā knows best.

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[1] *Fatāwā Mahmūdīyyah*, vol. 16, p. 391.

Medical insurance

Question

Is medical insurance permissible?

Answer

Medical insurance is similar to medical aid. The ruling will therefore be the same. That is, if the company treats a person in exchange for his contributions, and does not return the money to him, then it will be permissible. But if it gives the money over to him, it will be impermissible. Furthermore, the major portion of the company's income must be halāl. If the majority is harām, it will be impermissible. Refer to the previous detailed fatāwā for proofs.

Allāh ta'ālā knows best.

Medical insurance and mutual assistance

Question

Take the following form of medical insurance as an example: A few friends working in an office establish a formal fund where each person deposits a certain amount from his salary into the fund. Every member will be assisted from the fund when he requires medical treatment. If a large number of members is assisted from the fund, the fees of all members are increased. If a small number is assisted, the fees are reduced. Is this permissible?

Answer

Since this form of medical insurance does not contain the elements of usury or gambling during all stages of the process, and there is no other part which is against the Sharī'ah, then not only is it permissible; it is mustahab. This is one of the forms of insurance and mutual assistance which has been suggested by the 'ulamā'. Muslims ought to discard the unlawful forms of insurance and opt for those which are lawful.[1]

Observe the decision of the Islamic Fiqh Academy, Rābitah 'Ālam Islāmī, Makkah Mukarramah on the issue of mutual assistance:

Acting under the unanimous decision of the Saudi Arabian Hay'ah Kibār al-'Ulamā' (decree no. 51, dated 04/04/1397 A.H.), the Academy supports the verdict of permissibility with respect to cooperative

[1] Condensed from *Āp Ke Masā'il Aur Oen Kā Hull*, vol. 6, p. 257.

insurance and the impermissibility of commercial insurance. This is on the basis of the following proofs:

1. Cooperative insurance is a type of ʿaqd-e-tabarruʿ whose fundamental objective is the distribution of losses and sharing of responsibilities during calamities. To this end, some people collect cash monies and assist the person who has suffered loss. The objective of cooperative insurance is neither commerce nor making profits from the wealth of others. Rather, it is to distribute losses and make up for them.

2. Cooperative insurance is devoid of both types of usury – ribā al-faḏl and ribā an-nisā'. The agreement with the participants is neither usurious, nor are the collected monies used in usurious transactions.

3. In a cooperative insurance, the ignorance of the participants as regards the amount of benefits which are accrued is not harmful. This is because they are donors, and there is no fear of cheating and gambling. On the other hand, a commercial insurance is a financial commercial return.

4. Participants or their representatives use the contributions to make up an investment which is then used for the fulfilment of the objective of mutual assistance. Whether those who undertake the investment do it voluntarily or in return for a payment, there is no objection to this.

...It is the view of the assembly that the following principles be considered when preparing details on the issue of cooperative insurance:

1. The cooperative insurance organization must have a central office which has branches in all the cities. The organization must have separate compensations for losses, and separate departments according to the skills and professions of the participants. For example, a department for health insurance, a department for paraplegics, a department for the aged, etc.

2. The structure of the cooperative insurance organization must be simple and basic; it must be totally devoid of complex systems.

3. The organization must have a higher assembly which will decide on the modus operandi, and stipulate essential rules which will be promulgated only after they are in line with the Sharīʿah.

4. If losses are more than the income which the organization receives, and this causes an increase in the contributions, then the government and partners should bear that additional costs.

The Hay'ah Kibār al-'Ulamā' of the Islamic Fiqh Academy supports the view that detailed resources on cooperative insurance companies be prepared through the assistance of experts in the field.[1]

Further reading: *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 7, p. 292; *Jadīd Fiqhī Masā'il*, vol. 4, p. 102.

Allāh taʿālā knows best.

Becoming a member of a medical aid

Question

Is it permissible to become a member of a medical aid?

Answer

If a medical aid provides medical treatment in exchange for monetary contributions and the majority of its income is halāl, then it is permissible to become a member. If this is not the case, it will not be permissible.

Allāh taʿālā knows best.

Taking out an insurance

Question

An organization owns properties which include houses, schools, madāris and masājid. Is it permissible to take out insurance for these buildings? If it is impermissible, what is the reason for it? What is the ruling if someone has already taken out an insurance?

Answer

When we examine the fundamentals under which present-day insurance operate, we conclude that in the light of Sharīʿah principles, no type of insurance for possessions and properties is permissible. The ruling of impermissibility is because of the presence of prohibitions which are clearly and explicitly proven from the absolute texts – the Qur'ān, the Sunnah and ijmāʿ. The two prohibitions are usury and gambling. This is why insurance is harām.

Usury: The money which is given to an insurance company is classified as a loan according to jurisprudence. The additional benefits which are received when it is returned are, so to say, in recompense for the time

[1] *ʿAsr Hādir Ke Peychīdah Masā'il Kā Sharʿī Hull*, compiled by Qādī Mujāhidul Islām Qāsimī Sāhib rahimahullāh, pp. 37-40.

which was given and specified for the return of the loan. Although the insurance company refers to the benefits as a bonus, it is usury in reality. Changing its name cannot change its essence. It is with reference to this reality that Hadrat Muftī Muhammad Shafīʿ Sāhib rahimahullāh writes:

The mere changing of a name does not change the reality of a transaction. The benefits which are received from an insurance company undoubtedly fall under the definition of interest and usury.[1]

Gambling: The second evil which is found in it is qimār (gambling). The reality of gambling is that wealth is put down by both sides, while the profit and loss are linked to an unspecified and unknown thing. The jurists refer to this as khatar wa mukhātarah. The rule with regard to qimār as noted by the jurists is:

تعلیق الملک علی الخطر والمال فی الجانبین. (جواہر الفقہ: ۲/۲۲۷، وامداد الفتاوی: ۳/۱۶۱)

Abū Bakr Jassās Rāzī rahimahullāh writes:

لا خلاف بين أهل العلم في تحريم القمار وإن المخاطرة من القمار قال ابن عباس رضي الله عنه: إن المخاطرة قمار وإن أهل الجاهلية كانوا يخاطرون على المال والزوجة وقد كان ذلک مباحاً إلى أن ورد تحريمه. (احکام القرآن: ۱/۳۲۹، باب تحريم الميسر، وكذا فی احکام القرآن للتهانوی: ۱/۳۹۳)

رد المحتار:

وسمى القمار قماراً لأن كل واحد من المقامرين ممن يجوز أن يذهب ماله إلى صاحبه، ويجوز أن يستفيد مال صاحبه، وهو حرام بالنص. (رد المحتار: ۶/۴۰۳، کتاب الحظر والاباحة، سعيد)

Muftī Muhammad Shafīʿ rahimahullāh writes in *Maʿārif al-Qur'ān*:

All the Sahābah radiyallāhu ʿanhum and Tābiʿūn concur that all forms of gambling are included in maysir and that all are harām. Ibn Kathīr rahimahullāh in his *Tafsīr,* and Jassās rahimahullāh in *Ahkām al-Qur'ān*

[1] *Jawāhir al-Fiqh*, vol. 2, p. 181.

state that Hadrat ʿAbdullāh ibn ʿAbbās radiyallāhu ʿanhu, Ibn ʿUmar radiyallāhu ʿanhu, Qatādah radiyallāhu ʿanhu, Muʿāwiyah ibn Sālih radiyallāhu ʿanhu, ʿAtā' rahimahullāh and Tā'ūs rahimahullāh said:

الميسر القمار حتى لعب الصبيان بالكعاب والجوز.

Every type of qimār is maysir even to the extent of children's games with blocks of wood and walnuts.[1]

Faqīh Abū al-Layth Samarqandī rahimahullāh writes in his explanation of maysir:

وقال عطاء ومجاهد: الميسر القمار كله حتى لعب الصبيان بالجوز والكعاب. (تفسير السمرقندى: ٢٠٣/١)

In the case of an accident, there is the doubt of receiving benefits from an insurance company or not receiving them. This is included in qimār. And there are clear texts on the prohibition of qimār.

The Qur'ān states:

> يٰأَيُّهَا الَّذِيْنَ اٰمَنُوْآ إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِّنْ عَمَلِ الشَّيْطٰنِ فَاجْتَنِبُوْهُ لَعَلَّكُمْ تُفْلِحُوْنَ.
>
> O believers! This wine, gambling, idols and divining arrows are all vile deeds of Satan. Continually abstain from them, then, so that you may gain salvation.[2]

Imām Mālik ibn Anas rahimahullāh presents an example in this regard and then gives his verdict on it.

أن يعمد الرجل إلى الرجل قد ضلت راحلته أو دابته أو غلامه وثمن هذه الأشياء خمسون دينار فيقول: أنا آخذها منك بعشرين ديناراً فإن وجدها المبتاع ذهب من مال البائع بثلاثين ديناراً وإن لم يجدها ذهب البائع منه بعشرين ديناراً وهما لا يدريان كيف يكون حالهما في ذلك ولا يدريان

[1] *Maʿārif al-Qur'ān*, vol. 1, p. 532.

[2] Sūrah al-Mā'idah, 5: 90.

أيضاً إذا وجدت تلك الضالة كيف توخذ وما حدث فيها من أمر الله مما يكون فيه نقصها وزيادتها فهذا أعظم المخاطرة. (المدونة الكبرى: ٣/٢٥٤، كتاب الغرر، دار الفكر)

A man has lost his camel, animal or slave. Their value is fifty dīnārs for example. Another person goes to him and says: I am buying your lost item for twenty dīnārs." If this person finds the lost item, the owner would have suffered a loss of thirty dīnārs. If the buyer does not find the lost item, the seller would have received twenty dīnārs for nothing. At the time of the transaction, neither of them knows what is going to happen. Will the lost item be found or not? And if it is found, in what condition will it be? They also do not know if there was any increase or decrease in the item [e.g. if its body weight increased or decreased]. A transaction of this nature entails a lot of danger and it is a serious deception.

The same thing is demonstrated in this example, i.e. a transaction in which the consequences could be good or bad. This is not permissible in the Sharīʿah. The same can be said about insurance.

In short, an insurance company is an interest company. It is not permissible to contribute money into it, nor is it permissible to insure a masjid, madrasah, or any other building or property of an organization. If an organization mistakenly did this, it must reclaim only that amount which it contributed. It must never take the extra amount.

Allāh taʿālā knows best.

Motor vehicle and household insurance

Question

Is it permissible to insure a motor vehicle? For example, a person buys a new car and insures it for the value at which he bought it. If it gets stolen, the insurance company will pay its value. Also, if the car meets in an accident, the insurance company will have it repaired.

Answer

The first type of insurance where the insurance company pays an amount of money is totally harām. According to the Sharīʿah, usury and gambling are inevitable in it. The Qur'ān and Hadīth contain prohibitions for both.

If the insurance company does not pay an amount, and instead, has the vehicle repaired in return for the monthly premiums, then there is leeway for it. Nonetheless, caution demands that an agreement of this nature should not be entered into. Although there is ignorance about the recompense for the payment, it does not lead to dispute. Some ʿulamā’ say that this too is impermissible. No matter what, it entails assistance from a company which deals in interest. This is why one should abstain from such a transaction.

Hadrat Thānwī rahimahullāh writes:

When you consider the outer form of this agreement, it entails gambling.

لأنہ تعليق الملک على الخطر والمال فى الجانبين.

And when you consider its inner workings, then it is usury...Both, gambling and usury, are harām. This transaction is therefore undoubtedly harām.[1]

Muftī Kifāyatullāh Sāhib rahimahullāh writes:

It is not permissible to insure shops, factories and buildings through insurance companies. This is because insurance contains the elements of gambling and usury; and both these are harām.[2]

Muftī Taqī ʿUthmānī Sāhib rahimahullāh writes:

The scholars concur unanimously that insurance contains gambling and usury. It is gambling because on one side, there is a specified payment while on the other side the fulfilment is unspecified. The instalments which a person pays – all of them can be lost, and a person can even receive more than what he paid. This is known as qimār (gambling). It is usury because there is money in exchange for money, and it is not equal. The client pays a lesser amount while he receives more in return.[3]

Jadīd Fiqhī Masā’il:

Life-insurance and insurance of goods/possessions are fundamentally unlawful because they contain the elements of usury and gambling.[4]

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[1] *Imdād al-Fatāwā*, vol. 3, p. 161.

[2] *Kifāyatul Muftī*, vol. 8, p. 83.

[3] *Islām Aur Jadīd Maʿāshī Masā’il*, vol. 7, p. 290.

[4] *Jadīd Fiqhī Masā’il*, vol. 4, p. 124.

Islāmī Fiqh:

Current day insurance schemes contain several evils such as usury, gambling and so on. If you look at it morally and economically, then usury and gambling devour human morality, benevolence and cultural life as though they are weevils.[1]

Allāh taʿālā knows best.

Mandatory insurance

Question

It is the practice of some companies to deduct a certain amount from the salaries of their employees and to deposit it into a life insurance fund. The company deducts this amount before the employee can receive his salary. He has no choice in the matter as he is bound by the rules and regulations of the company. When he passes away, his heirs receive an astronomical amount which is far more that what had been deducted from his salary. Is this amount lawful for the heirs? Also, what is the ruling with regard to mandatory insurance?

Answer

Nowadays it is virtually impossible to get a job without insurance, or to retain a job if a person already has one. Furthermore, when there are unrests, Muslims suffer financial losses. As per government regulations, life insurance has been made mandatory in different jobs. Without it, one is either ineligible to obtain a job, or if he has, he cannot maintain it. In a compelled situation like this, insurance of this nature will be permitted. Some scholars have stated this in their legal verdicts. At the same time, the person's heart must feel that this is a wrong, and he must continue repenting and seeking forgiveness.

In the case where a person takes out a voluntary insurance, he may only use the money which he contributed. It is not permissible for him to take the additional amount. Instead, he must give it in charity without the intention for reward. As for the case where the company deducts an amount from the employee's salary without his choice, and then he receives an additional amount; it is not usury. It is permissible to use it.

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[1] *Islāmī Fiqh*, vol. 2, p. 360.

Fatāwā Mahmūdīyyah:

Insurance contains the elements of gambling and usury – both of which are harām. Insurance is also prohibited. Nonetheless, if a person is living in a place where his life and property cannot be protected without insurance, or he is compelled by the law to take out insurance; then it will be permissible to take out an insurance.[1]

When it is difficult to continue life without a business, factory or shop; and there is a legal requirement, the person will be classified as excused to take out insurance. At the same time, whatever amount he receives over and above his actual contribution must be given in charity to the poor. He must not use it for himself.[2]

Jadīd Fiqhī Masā'il:

All forms of insurance which are classified as mandatory by the government will be permissible. For example, in the case of import and export when engaged in trade with foreign companies. The person has no choice in the matter but to have the goods insured.[3]

Imdād al-Fatāwā:

To deduct a certain amount from a person's salary and for him to receive it in lump-sum, then whatever he receives – even if it is in the name of usury – is permissible. In reality, it is not interest because the percentage of the salary which the employee did not receive was not included in his ownership. The additional amount was not given to him from the benefits of the amount which he owned. Rather, it is an initial donation which the government – in its terminology refers to as interest...[4]

Jadīd Fiqhī Mabāhith:

Although the government refers to the additional amount as interest, the definition of interest will only apply if we personally deposit some money and receive an additional amount on it. In this case, the government deducted an amount of its own accord without our permission, and it is still not in our possession and ownership. It then

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[1] *Fatāwā Mahmūdīyyah*, vol. 16, p. 387.

[2] *Fatāwā Mahmūdīyyah*, vol. 16, p. 390.

[3] *Jadīd Fiqhī Masā'il*, vol. 4, p. 124.

[4] *Imdād al-Fatāwā*, vol. 3, p. 149.

adds to that amount. Therefore, whatever additions are made to it will not be made to what we own. Rather, it will be an initial donation.[1]

Niẕām al-Fatāwā:

The money which the government deducts forcefully in the name of insurance and whatever additional amount is received – all of it is not unlawful. We may accept it and use it for ourselves.[2]

Further reading: *Jadīd Fiqhī Mabāẖith*, vol. 4, p. 237; *Fatāwā ʿUthmānī*, vol. 3, p. 314; *Jadīd Fiqhī Masā'il*, vol. 1, p. 435; *Aẖsan al-Fatāwā*, vol. 7, p. 25.

Observe a few general proofs on the permissibility of mandatory insurance.

A major principle of the Sharīʿah is ease, and the removal of difficulty.

قال الله تعالىٰ: يريد الله بكم اليسر ولا يريد بكم العسر. (سورة البقرة، الآية:١٨٥)

وقال تعالىٰ: وما جعل عليكم فى الدين من حرج. (سورة الحج، الآية:٧٨)

The following are some of the unanimously accepted principles of jurisprudence:

المشقة تجلب التيسير. (الاشباه والنظائر: ١/٢٢٦)

الضرورات تبيح المحظورات. (شرح المجلة، وقواعدالفقه، والاشباه: ١/٢٥١)

الحاجة تنزل منزلة الضرورة عامة أو خاصة. (الاشباه والنظائر: ١/٢٦٧)

وما حرم لذاته يباح للضرورة. (تفسير المنار لمحمد رشيد بن على رضا، ٦/٢٢٣)

وما حرم سداً لذريعة يباح للحاجة. (تفسير المنار لمحمد رشيد بن على رضا، ٦/٢٢٣)

إذا ضاق الأمر اتسع. (قواعد الفقه، ص ٦٢)

Allāh taʿālā knows best.

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[1] *Jadīd Fiqhī Mabāẖith*, vol. 4, p. 485.

[2] *Niẕām al-Fatāwā*, vol. 2, p. 236.

Third party insurance

Question

Is third party insurance permissible? Essentially, it refers to a responsibility which could be placed on a person in the future. Insurance is taken out to fulfil that responsibility. For example, the danger of someone suffering a loss because of you driving your vehicle on a road. In such a case, the driver will have to pay a fine. An insurance is taken out for this purpose. When an accident takes place, and a fine has to be paid, the insurance company pays for it. This is generally known as a third party insurance. In Western countries, if a person did not clear the snow from the area in front of his house; and someone slips, falls and hurts himself, a case is opened against the home-owner and a heavy fine is imposed on him. To save themselves from this danger, home-owners take out an insurance. This is also one form of ta'mīn al-mas'ūlīyyah in which the insurance company pays the fine on behalf of its client. What is the ruling with regard to insurance of this nature?

Answer

The ʿulamā' differ on the issue of third party insurance. Some of them say that it is unlawful. For example, Hadrat Muftī Taqī ʿUthmānī Sāhib says that every type of insurance is harām and unlawful because it contains the elements of usury and gambling. Refer to *Fatāwā ʿUthmānī*, vol. 3, p 328; *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 7, p. 290; *Islām Aur Jadīd Maʿīshat Wa Tijārat*, p. 161.

Other scholars are inclined to its permissibility.

Jadīd Fiqhī Mabāhith:

If the driver was at fault for an accident and someone passes away in it, then according to the Sharīʿah, the driver is liable to pay blood money for qatl-e-khata'. But how is he going to pay such an astronomical amount? Islam instituted the concept of ʿāqilah, i.e. his family members joining in to pay the blood money. Nowadays, the family tribal system no longer exists and, generally, the driver cannot bear the entire burden. Modern society introduced a system of third party insurance and provided much ease in doing so ...In reality, this insurance is a form of assistance. It is another matter that certain corrupt elements have been included into this system. Nonetheless, since it is done to fulfil an inevitable civilizational need, we cannot say that it is unlawful.

...Third party motor insurance is an important and permissible type of agreement of this age notwithstanding the corrupt elements which have crept into it. The sin will be on those who run this system.[1]

Jadīd Fiqhī Masā'il:

It is my view that this type of insurance ought to be permissible in every such society where a practical system of ʿāqilah is not found. There is no question of interest in this type of insurance because in the event of an insurance client not meeting in an accident, he does not receive any money. However, there is a danger that if he does meet in an accident, he will have to pay from the monies which he deposited. If an accident takes place, he will receive more than what it cost him. But if we were to think about it, this level of danger is also found in the ʿāqilah system, in the walā'-e-muwālāt, and in other transactions. The fact of the matter is that this type of insurance is similar to donations. The person who pays the insurance premiums is presenting a donation for people of a similar occupation. Sometimes, if he himself becomes caught up in it, he receives assistance from those who are in a similar occupation.[2]

The reality of this agreement is that there is no interest in it. The insurance company does not pay any money to the client. Rather, it fixes and repairs the vehicle of the other person. This will entail a service recompense. Yes, it contains the element of gharar in the sense that if the car does not meet in an accident, then one party has certainly made payments while there is no certainty from the other party. An answer to this is that this is a minor gharar which does not lead to dispute. We learn from the texts of the jurists that minor gharar can be accommodated in transactions; they do not invalidate an agreement.

Observe some of the statements of the jurists on the issue of gharar.

An investigation into gharar

The scholars give various definitions for gharar. Observe the following:

ʿAllāmah Sarakhsī rahimahullāh:

الغرر ما يكون مستور العاقبة. (المبسوط: ١٢/١٩٤، ادارة القرآن)

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[1] *Jadīd Fiqhī Mabāhith*, vol. 4, pp. 296-297, compiled by Qādī Mujāhidul Islām Sāhib Qāsimī rahimahullāh.

[2] *Jadīd Fiqhī Masā'il*, vol. 4, p. 120.

ʻAllāmah ʻAynī ra<u>h</u>imahullāh writes:

الغرر وهو فى الأصل الخطر، والخطر هو الذي لا يدرى أيكون أم لا، وقال ابن عرفة: الغرر هو ما كان ظاهره يغر وباطنه مجهول، قال والغرور ما رأيت له ظاهراً تحبه وباطنه مكروه أو مجهول، وقال الأزهري: بيع الغرر ما يكون على غير عهدة ولا ثقة، وقال صاحب المشارق: بيع الغرر بيع المخاطرة، وهو الجهل بالثمن أو المثمن أو سلامته أو أجله. (عمدة القارى: ٤٣٥/٨، ملتان)

وقال في إكمال المعلم: فأما الغرر فما تردد بين السلامة والعطب أو ما في معنى ذلك، وذلك أنه يلحق بمعنى إضاعة المال، لأنه قد لا يحصل المبيع ويكون بذل ماله باطلاً. (اكمال المعلم: ١٣٣/٥، باب بطلان بيع الحصاة والبيع الذى فيه الغرر)

وقال ابن العربي فى القبس: فأما الغرر فهو كل أمر خفيت علانيته وانطوى أمره. (القبس: ٧٩٢/٢)

وقال ملك العلماء: الغرر هو الخطر الذي استوى فيه طرف الوجود والعدم بمنزلة الشك. (بدائع الصنائع: ١٦٣/٥، سعيد)

ʻAllāmah Kāsānī ra<u>h</u>imahullāh says that gharar refers to an uncertain condition where existence and non-existence are equal. It is on the level of a doubt.

There are many texts prohibiting gharar:

قال العلامة العيني: وقد وردت أحاديث كثيرة فى النهي عن بيع الغرر: منها: رواه مسلم في صحيحه من حديث أبي هريرة رضي الله عنه قال: نهى رسول الله صلى الله عليه وسلم عن بيع الحصاة، وعن بيع الغرر، وأخرجه الأربعة أيضاً، ومنها: حديث ابن عمر رضي الله عنه رواه البيهقى من حديث نافع عنه، قال : نهى رسول الله صلى الله عليه وسلم عن بيع الغرر. ومنها حديث ابن عباس رضي الله عنه أخرجه ابن ماجة من حديث عطاء عنه قال: نهى

رسول الله صلى الله عليه وسلم عن بيع الغرر، ومنها حديث أبي سعيد أخرجه ابن ماجة أيضاً من حديث شهر بن حوشب عنه قال: نهى رسول الله صلى الله عليه وسلم عن شراء ما في بطون الأنعام حتى تضع، وعما في ضروعها إلا بكيل، وعن شراء العبد وهو آبق وعن شراء المغانم حتى تقسم وعن شراء الصدقات حتى تقبض، وعن ضربة القانص. ومنها حديث على رضي الله عنه أخرجه أبو داود وفيه: قد نهى النبي صلى الله عليه وسلم عن بيع المضطر وبيع الغرر.ومنها: حديث ابن مسعود رضي الله عنه أخرجه أحمد عنه قال: قال رسول الله صلى الله عليه وسلم: لا تشتروا السمک فى الماء فإنه غرر ومنها: حديث عمران بن الحصين رضي الله عنه أخرجه ابن أبي عاصم في كتاب البيوع: أن النبي صلى الله عليه وسلم نهى عن بيع ما في ضروع الماشية قبل أن تحلب وعن بيع الجنين في بطون الأنعام، وعن بيع السمک فى الماء وعن المضامين والملاقيح وحبل الحبلة وعن بيع الغرر. (عمدة القارى: ٤٣٦/٨، باب بيع الغرر)

The gist and essence of the above texts is that Rasūlullāh s̱allallāhu ʻalayhi wa sallam prohibited transactions in which there is gharar. Before Islam, there were many transactions which were in vogue, but Rasūlullāh s̱allallāhu ʻalayhi wa sallam prohibited them on the basis of gharar. For example:

بيع حبل الحبله، بيع المضامين، بيع الملاقيح، بيع الملامسه، بيع المنابذه، بيع الحصاة، بيع عسب الفحل، بيع الثمر قبل بدو صلاحه، بيع السمک فى الماء الكثير، بيع الطير فى الهواء، بيع اللبن فى الضرع، بيع ضربة القانص وغيرها من البياعات التي تتضمن الغرر الفاحش المؤدي إلى النزاع المشكل بين العاقدين.

Generally, there are several reasons which cause gharar and ignorance.

1. The existence of the item is not known with certainty, e.g. a slave who has escaped.

2. The existence of the item is known but its acquisition is not certain, e.g. a bird flying in the air or a fish in water.
3. The very nature of the item is unknown.
4. The nature of the item is known but the type/category is unknown.
5. The quantity is unknown and unspecified.
6. The continued existence of the item is uncertain, e.g. selling fruit of a tree before it can flower.
7. The time-span in unknown.

Types of gharar

There are two types of gharar:

1. Gharar-e-kathīr, fāhish (excessive or outrageous gharar).
2. Gharar-e-yasīr, qalīl, haqīr (slight, little or insignificant gharar).

The rule of gharar

After reviewing the texts of the jurists and Hadīth experts, we conclude that every type of gharar is not an invalidator of a transaction. Rather, excessive gharar is prohibited and an invalidator. Slight gharar is overlooked.

Hadrat Shaykh Maulānā Muhammad Zakarīyyā rahimahullāh writes in *Aujaz al-Masālik*:

وقال الباجي: هو ما كثر فيه الغرر، وغلب عليه حتى صار البيع يوصف ببيع الغرر، فهذا الذي لا خلاف فى المنع منه، وأما يسير الغرر، فإنه لا يؤثر في فساد عقد بيع فإنه لا يكاد يخلو عقد منه. (اوجز المسالک، باب بيع الغرر، ۸۸/۱۳، دمشق)

ʿAllāmah ʿAynī rahimahullāh writes:

وروى الطبري عن ابن سيرين بإسناد صحيح، قال: لا أعلم ببيع الغرر بأساً، وقال ابن بطال: لعله لم يبلغه النهي، وإلا فكل ما يمكن أن يوجد وأن لا يوجد لم يصح وكذلک إذا كان لا يصح غالباً، فإن كان يصح غالباً كالثمرة في

أول بدو صلاحها أو كان يسيراً تبعاً كالحمل مع الحامل جاز لقلة الغرر، ولعل هذا هو الذي أراد ابن سيرين. (عمدة القارى، باب بيع الغرر وحبل الحبلة: ٤٣٨/٨، ملتان)

جمهرة القواعد الفقهية:

وهذا النهى الوارد منصب على الغرر الكثير الفاحش إذ اليسير منه معفو عنه باتفاق العلماء، إذ هو من قبيل ما لا يستطاع الاحتراز منه فى المعاملات، فهناك نصوص فقهية كثيرة تطرقت إلى هذا المفهوم. (جمهرة القواعد الفقهية: ٣٠٩/١)

زاد المعاد:

ليس كل غرر سبباً للتحريم، والغرر إذا كان يسيراً أو لا يمكن الاحتراز منه لم يكن مانعاً من صحة العقد. (زاد المعاد: ٨٢٠/٥، بيع المغيبات)

الموفقات:

أصل البيع ضروري، ومنع الغرر والجهالة مكمل، فلو اشترط نفي الغرر جملة لا نحسم باب البيع. (الموفقات: ٧/٢، كتاب المقاصد، المسألة الثالثة، دار الفكر)

وقال الإمام النووي في شرح مسلم: أجمع المسلمون على جواز أشياء فيها غرر حقير. (شرح مسلم: ٢/٢، كتاب البيوع)

تكملة فتح الملهم:

فأما الغرر بمعنى جهالة المبيع فربما يحتمل إذا كان يسيراً دعت الحاجة إليه، ولم يكن مفضياً إلى المنازعة فى العرف، قال العبد الضعيف عفا الله عنه: ويخرج على هذا كثير من المسائل في عصرنا، فقد جرت العادة في بعض الفنادق

الكبيرة أنهم يضعون أنواعاً من الأطعمة في قدور كبيرة، ويخيرون المشتري في أكل ما شاء بقدر ما شاء، ويأخذون ثمناً واحداً معيناً من كل أحد، فالقياس أن لا يجوز البيع لجهالة الأطعمة المبيعة وقدرها، ولكنه يجوز لأن الجهالة يسيرة غير مفضية إلى النزاع، وقد جرى بها العرف والتعامل. (تكملة فتح الملهم: ٣٢٠/١. وكذا في جمهرة القواعد الفقهية:٣٢٠/١)

<u>اكمال المعلم:</u>

ولما رأيناهم أجمعوا على جواز المسائل التي عددناها، قلنا: ليس ذلك إلا لأن الغرر فيها نزر يسير غير مقصود، وتدعو الضرورة إلى العفو عنه. (اكمال المعلم شرح صحيح مسلم للقاضى عياض، باب بطلان بيع الحصاة والبيع الذى فيه غرر، ١٣٤/٥، دار الوفاء)

Jadīd Fiqhī Masā'il:

The circle of gharar is quite extensive. This is why the jurists specified different levels for it. Excessive gharar prohibits the permissibility of a transaction while a slight gharar does not.[1]

In short, bearing in mind the differences of opinion of the 'ulamā' on this issue, a person should abstain from every type of insurance.

Allāh ta'ālā knows best.

The AA (Automobile Association)

<u>Question</u>

We have the AA in our country. If your car breaks down, it takes the responsibility of towing it and repairing it. In exchange, you have to pay an annual amount. Is this permissible? Will this company be referred to as an ajīr-e-khā̱s or ajīr-e-mushtarak? Similarly, there is another company for the security of one's vehicle. If it gets stolen, it tracks the location of the vehicle. Here too, a person has to pay a monthly fee. Is this permissible?

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[1] *Jadīd Fiqhī Masā'il*, vol. 4, p. 209.

Answer

This transaction is permitted because a person receives a service in exchange for a payment. Nonetheless, one objection to it is that it may well be that the car never needs to be towed or repaired. Will the company still be eligible for the monthly or annual payments? If the company is classified as an ajīr-e-khās̱, it will be eligible for payment. However, since it also accepts work from other people, it ought to be classified as an ajīr-e-mushtarak.

The answer to this objection is that companies of this nature are neither ajīr-e-khās̱ nor ajīr-e-mushtarak. Rather, they fall between the two. If you look at them as ajīr-e-khās̱, they will be eligible for payment. They will also be classified as ajīr-e-mushtarak because of their accepting work from other people.

والحاصل أن المسائل فى الظئر تعارضت فمنها ما يدل على أنها في معنى أجير الوحد كقولهم لعدم الضمان فى ہذہ، ومنها ما يدل على أنها في معنى المشترک كقولهم إنها تستحق الأجر على الفريقين إذا أجرت نفسها لهما، قال الاتقاني: والصحيح أنہ إن دفع الولد إليها لترضعہ فهي أجير مشترک وإن حملها إلى منزلہ فهي أجير وحد وقال فى العناية: وذكر فى الذخيرة ما يدل على أنها يجوز أن تكون خاصاً ومشتركاً حتى لو أجرت نفسها لغيره استحقت الأجر على الفريقين كاملاً عملاً بشبہ الأجير المشترک وتأثم نظراً إلى أن لها شبهاً بالأجير الخاص. (فتح المعين: ٢٥٤/٣، وكذا فى فتاوى الشامى: ٧١/٦، سعيد)

أقول: ويرتفع الإثم إذا كان الإذن بالعمل للغير.

Allāh taʿālā knows best.

Taking out an insurance

Question

A transport company transports goods at a specified price, e.g. R50. It offers insurance for the transported goods at an additional charge of ten percent. This transport company is probably taking out the insurance with some other company. The goods which it is transporting are expensive items such as laptops, computers, etc. Is insurance of this nature permissible?

Answer

Insurance contains two elements which are harām – gambling and usury – and that is why it is also harām. It is therefore impermissible for the person who is having the goods transported to take out the insurance. This is irrespective of whether the transport company does the insurance itself or gives it to an insurance company. In this case, it is as though the transport company is an agent acting on behalf of the one who ordered the goods to be transported. The actual agreement is between him and the insurance company. It is therefore necessary to abstain from such a transaction.

لا خلاف بين أهل العلم في تحريم القمار وإن المخاطرة من القمار قال ابن عباس رضي الله عنه: إن المخاطرة قمار وإن أهل الجاهلية كانوا يخاطرون على المال والزوجة وقد كان ذلك مباحاً إلى أن ورد تحريمه. (احكام القرآن: ٣٢٩/١، باب تحريم الميسر، وكذا فى احكام القرآن للتهانوى: ٣٩٣/١)

رد المحتار:

وسمى القمار قماراً لأن كل واحد من المقامرين ممن يجوز أن يذهب ماله إلى صاحبه، ويجوز أن يستفيد مال صاحبه، وهو حرام بالنص. (رد المحتار: ٤٠٣/٦، كتاب الحظر والاباحة، سعيد)

الربا هو فضل خال عن عوض بمعيار شرعى شرط لأحد المتعاقدين فى المعاوضة. (فتاوى الشامى: ١٦٨/٥، سعيد)

Fatāwā Mahmūdīyyah:

Insurance contains the elements of gambling and usury – both of which are harām. Insurance is also prohibited.[1]

Yes, medical aid is permissible because cash money is deposited, and the person does not receive money in return. Rather, he receives medical treatment. In the above case, the person receives money in exchange for money.

Allāh taʿālā knows best.

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[1] *Fatāwā Mahmūdīyyah*, vol. 16, p. 387.

Becoming an insurance agent

<u>Question</u>

Zayd is an insurance agent working for several companies which offer long-term and short-term insurance. Obviously, these companies pay him a commission for securing clients for them. Most insurance companies are immersed in usurious transactions. Will it then be permissible to become such an agent? What is the ruling with regard to accepting the commission?

<u>Answer</u>

Nowadays, the business of most insurance companies comprises of gambling and usury. It is therefore not permissible to have an agency for them. The commission which is received by them is also unlawful. One ought to safeguard one's self from it. Yes, there is room to join companies whose major business is halāl.

أَحَلَّ اللّٰهُ الْبَيْعَ وَحَرَّمَ الرِّبَا.

> Allāh permits trade and prohibits usury.[1]

يٰأَيُّهَا الَّذِيْنَ اٰمَنُوا اتَّقُوا اللّٰهَ وَذَرُوْا مَا بَقِيَ مِنَ الرِّبٰوا إِنْ كُنْتُمْ مُّؤْمِنِيْنَ. فَإِنْ لَّمْ تَفْعَلُوْا فَأْذَنُوْا بِحَرْبٍ مِّنَ اللّٰهِ وَرَسُوْلِهِ.

> O believers! Fear Allah and forsake whatever usury that is outstanding if you have conviction in the order of Allāh. If you do not desist, prepare to fight Allāh and His Messenger.[2]

وَلَا تَعَاوَنُوْا عَلَى الْإِثْمِ وَالْعُدْوَانِ.

> Do not help each other in sin and transgression.[3]

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[1] Sūrah al-Baqarah, 2: 275.

[2] Sūrah al-Baqarah, 2: 278.

[3] Sūrah al-Mā'idah, 5: 2. *Jadīd Mu'āmalāt Ke Shar'ī Ahkām*, vol. 1, p. 82.

عن جابر رضي الله عنه قال: لعن رسول الله صلى الله عليه وسلم: آكل الربا وموكله، الخ. (رواه مسلم: ٢/٢٨، باب الربا، قديمى)

> Rasūlullāh sallallāhu ʿalayhi wa sallam cursed the devourer of usury, the one who appoints another over it…

Jadīd Fiqhī Masā'il:

Essentially, insurance contains the elements of usury and gambling. It is therefore unlawful for a Muslim to become an insurance agent and to make it a source of income.[1]

Allāh taʿālā knows best.

Insurance for a medical practitioner

Question

Is it permissible for a medical practitioner to take out a medical insurance? This means that he takes out an insurance so that if he commits an error in the course of a treatment, operation, etc. and a patient suffers loss on account of it, then the insurance company will pay for damages on his behalf. A Muslim will consider benefit and loss to be a divine decree and may not make any claims against a doctor, but a non-Muslim who does not believe in predestination will sue for damages and demand astronomical amounts of money. Is it permissible for a medical practitioner to take out an insurance to save himself from such a situation?

Answer

Generally, in an insurance of this nature, a person receives money in exchange for money. An insurance company even pays out more. This is clear-cut usury which is harām. It is therefore necessary for a Muslim, on the basis that he is a Muslim, to abstain from insurance of this nature. Yes, if the insurance company does not pay out money, and instead, gets the patient who suffered a loss admitted into a better equipped hospital where he will be treated by more proficient medical practitioners, then there will be leeway for this.

Allāh taʿālā knows best.

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[1] *Jadīd Fiqhī Masā'il*, vol. 1, p. 438; *Āp Ke Masā'il Aur Oen Kā Hull*, vol. 6, p. 258.

Provident funds

Question

A certain percentage is deducted monthly from the salaries of government employees. It is done by force; employees have no choice in the matter. When the term of employment comes to an end, the money together with an additional amount is paid out to the employee. Is it permissible to accept this money and to use it for one's self?

Answer

It is permissible to accept and use monies which are received from a provident fund at the end of one's employment. The amount which the government deducts from the monthly salary is a right; it does not come into the employee's ownership. Therefore, the interest which the government pays out for it is not really interest. Interest refers to a preconditioned amount from one's own wealth. Whereas here, the amount is not owned by the employee.

Kifāyatul Muftī:

The amount which is given by the government departments in the name of a provident fund and other amounts which are added to it in the name of interest – all these amounts are lawful. The added amount is not classified as interest by the Sharīʿah even though the department may classify it as such.[1]

Fatāwā ʿUthmānī:

The additional amount which is paid out in a mandatory provident fund is not classified as interest by the Sharīʿah. It is therefore permissible to accept it.[2]

Fatāwā Mahmūdīyyah:

This system has been initiated by the government for the wellbeing of its employees. As long as an employee does not take possession of it, it does not belong to him. Therefore, whatever additional amount he receives will not be interest.[3]

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[1] *Kifāyatul Muftī*, vol. 8, p. 97.

[2] *Fatāwā ʿUthmānī*, vol. 3, p. 307.

[3] *Fatāwā Mahmūdīyyah*, vol. 16, p. 394.

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

The government deducts a certain amount monthly from the salaries of its employees. This is done by force. It is referred to as a GP Fund. When the employee retires, he receives the entire amount. If he passes away, it is paid out to his heirs. He also receives an additional amount which is referred to as interest. What is the Sharīʿah ruling with regard to the additional amount? The answer is that it is not interest according to the Sharīʿah because an interest transaction is agreed upon between two persons when there is wealth on both sides and it is owned by them. In this case, the amount which is deducted from the employee's salary does not belong to him. For it to be included in his possession, it has to be given over to him, and he must have control over it.

قال العلامة ابن نجيم: قوله بل بالتعجيل أو بشرطه أو بالاستيفاء أو بالتمكن أى لا يملك الأجرة إلا بواحد من هذه الأربعة. (البحر الرائق: ٧/٣٠٠)

Because the employee or his representative did not take possession of it, he is not its owner. He will not exercise his rights over it. Now whether the government gives the original amount, an additional amount, or an additional amount in the name of interest – all will be classified as a part of his salary which the government collected and whose payment it deferred. Hadrat Muftī Shafīʿ Sāhib rahimahullāh writes: "The amount which is received as interest on a provident fund is not interest according to the Sharīʿah. Rather, it is a part of the salary."[1]

Āp Ke Masā'il:

It is permissible to accept the additional amount which is given by the government in a provident fund.[2]

Further reading: *Muntakhabāt Nizām al-Fatāwā*, vol. 1, p. 208; *Ahsan al-Fatāwā*, vol. 7, p. 50; *Jadīd Fiqhī Masā'il*, vol. 1, p. 249; *Jadīd Fiqhī Mabāhith*, vol. 6, p. 290; *Provident Fund Parr Zakāt Aur Sūd Kā Mas'alah* of Hadrat Muftī Muhammad Shafīʿ Sāhib.

Allāh taʿālā knows best.

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[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 169.

[2] *Āp Ke Masā'il Aur Oen Kā Hull*, vol. 6, p. 212.

Voluntary provident fund

<u>Question</u>

A person is employed by a company and he receives a salary of R2000. R200 is deducted from his salary every month. This deduction is approved by him. The company adds R100 from its side. When his employment terminates, he receives the full amount which was accumulated over the years. Is it permissible for him to accept it?

<u>Answer</u>

Many scholars have issued the same verdict for both types of provident funds [mandatory and voluntary]. However, where it is deducted voluntarily, we find a similarity with usury. A person should abstain from it so that it does not become a means of devouring usury.

Hadrat Muftī Muhammad Shafī' Sāhib rahimahullāh writes:

When an amount is deducted voluntarily from a provident fund, it contains a resemblance with usury. There is the danger of making it a means to earn interest. One should therefore desist from it.[1]

Jadīd Mu'āmalāt Ke Shar'ī Ahkām:

If an employee has an amount voluntarily deducted from a GP Fund and then, upon the termination of his employment, receives the accumulated contributions with an added interest amount, then the Sharī'ah ruling is that the original amounts are halāl. The additional amounts which he receives from the government in the name of interest contain the element of resemblance with usury. It has the danger of becoming a means to accept usury in the future. A person should therefore desist from it.[2]

Fatāwā 'Uthmānī:

The same rule applies to voluntary and mandatory provident funds. However, the additional amounts which he will receive for his voluntary contributions must be given in charity as a precaution.[3]

Some 'ulamā' classify the additional amount as usury and say that it is harām.

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[1] *Provident Fund Parr Zakāt Aur Sūd Kā Mas'alah*, p. 4.

[2] *Jadīd Mu'āmalāt Ke Shar'ī Ahkām*, vol. 1, p. 170.

[3] *Fatāwā 'Uthmānī*, vol. 3, p. 308.

Āp Ke Masā'il:

If an employee volunteers to have an amount deducted, it is not permissible for him to accept the additional amount; it is usury.[1]

Allāh taʿālā knows best.

Pension fund

Question

Governmental employees receive a pension at the end of their employment. They are paid a lump sum of half their monthly salaries multiplied by the number of months they worked. Is it permissible to accept this amount?

Answer

A pension from the government is solely a gift and a type of assistance. It is permissible to accept it.

Hadrat Muftī Kifāyatullāh Sāhib rahimahullāh writes:

The pension which an employee receives at the termination of his employment is permissible.[2]

Fatāwā Mahmūdīyyah:

When a person's employment comes to an end, some courts and departments pay a pension as a recompense for his good services. It cannot be referred to as interest.[3]

Āp Ke Masā'il:

A pension is a sort of gift. The agreement between a pensioner and the government is valid; it does not entail gambling and usury.[4]

Allāh taʿālā knows best.

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[1] *Āp Ke Masā'il Aur Oen Kā Hull*, vol. 6, p. 225; *Imdād al-Ahkām*, vol. 3, p. 472; *Fatāwā Haqqānīyyah*, vol. 6, p. 213.

[2] *Kifāyatul Muftī*, vol. 8, p. 97.

[3] *Fatāwā Mahmūdīyyah*, vol. 16, p. 394.

[4] *Āp Ke Masā'il Aur Oen Kā Hull*, vol. 8, p. 294.

Retirement policy

Question

While a person was alive, he voluntarily took out a life insurance and retirement policy in favour of his wife. Now that he has passed away, the insurance company will pay a large amount to his wife. She will also receive a monthly pension. Is this permissible?

Answer

A life insurance and retirement policy contract in which a person receives cash in exchange for cash, plus an additional amount is a usurious contract, and unlawful. It is necessary and essential to desist from it. Nonetheless, if a person entered into such a contract mistakenly, out of ignorance or due to sinning and immorality, then whatever amount which is over and above his actual contribution must be given in charity without the intention of reward. The amounts which he had contributed will be distributed among all the deceased's Sharʿī heirs. As for a company's monthly pension, it is classified as a donation and it can be accepted.

Jadīd Maʿāshī Masā'il:

There are three factors which make life insurance harām:

1. The person receives an amount which is over and above his contributions. It is given as interest. It is therefore classified as interest.
2. Insurance – in its outer form – is gambling. Take the case of a person who wants the insurance: When will he pass away? How much additional money will he receive? If the monthly contribution is stopped due to some reason, the previous contributions are sequestered. All this relates to the principle of taʿlīq al-milk ʿalā al-khatar (placing one's wealth in danger) which the Sharīʿah classifies as gambling.
3. Man's life and body parts cannot have a value attached to them. And there is no recompense for something which is not given a value. Assuming a value were to be attached, it is not a recompense but a bribe in appearance. And bribery is also harām and the person is punishable for it.

Based on these reasons, life insurance is absolutely harām. There is no basis whatsoever for its permissibility in the Sharīʿah.

Jadīd Maʿāshī Masā'il, p. 93 as quoted from *Imdād al-Fatāwā*, vol. 3, p. 161; *Fatāwā Rahīmīyyah*, vol. 2, p. 200; *Fatāwā Mahmūdīyyah*, vol. 6, p. 308;

Kifāyatul Muftī, vol. 8, p. 76; *Āp Ke Masā'il Aur Oen Kā Hull*, vol. 6, p. 255; *Jadīd Fiqhī Masā'il*, vol. 1, p. 260; *Nizam al-Fatāwā*, vol. 1, p. 192.

Majmū'ah Qawānīn Islāmī:

If a person enters into a contract in favour of another person for a provident fund, life insurance, co-operative society, etc. then the person in whose favour it was written – whether an heir or not – is neither a legatee nor a donee. He will merely be a trustee. Therefore, the monies which accumulated and were deducted will be distributed among his Shar'ī heirs as per the shares laid down by the Sharī'ah. It will be necessary to give the interest to the poor without an intention for reward. In the same way, if the contractor's life or wealth is destroyed and he receives a payment in return, it will be divided among his heirs as laid down by the Sharī'ah.[1]

Allāh ta'ālā knows best.

Education policy

Question

A person took out an insurance in favour of his daughter. The insurance company receives a monthly payment. When she reaches the age of twenty-five, she will receive a large amount of money from the insurance company. Will it be permissible to accept this amount to pay for education fees, etc.?

Answer

In an educational insurance, the person receives money in exchange for money. This is an interest transaction. It is unlawful. One may only accept and use the amounts which were contributed by the person. The additional amount is interest which has to be given in charity without the intention of reward.

Allāh ta'ālā knows best.

Mutual fund

Question

Fifty women get together and give two hundred rupees each to one of the women whom they appoint as their treasurer. They draw a lot at the end of each month, and the woman whose name comes out

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[1] *Majmū'ah Qawānīn Islāmī*, compiled by Qādī Mujāhidul Islām Sāhib Qāsimī, p. 255, register number 10.

receives the entire amount. The next month another woman receives it. Each woman gets a turn; no one is deprived. There is also no interest in it. Rather, they only receive how much they paid in. Is this arrangement permissible?

Answer

Not only is it permissible, it is recommended. It is like giving a loan to each other and providing financial assistance. The woman whose name was drawn first is as though she received a loan from the other women and they assisted her. There are many virtues for mutual assistance as mentioned in the Qur'ān and Hadīth. Some of them are:

قال الله تعالىٰ: وتعاونوا على البر والتقوى. (سورة المائدة، الآية: ٢)

قال الإمام القرطبي: وہو أمر لجميع الخلق بالتعاون إلى البر والتقوى؛ أى ليُعِن بعضكيم بعضاً ... وقال الماوردي: ندب الله سبحانہ وتعالىٰ إلى التعاون بالبر وقرنہ بالتقوى لہ؛ لأن فى التقوى رضا الله تعالىٰ، وفى البر رضا الناس، ومن جمع بين رضا الله تعالىٰ ورضا الناس فقد تمت سعادتہ وعمت نعمتہ،... والتعاون على البر والتقوى يكون بوجوہ؛ فواجب على العالم أن يعين الناس بعلمہ فعيلمہم، ويعينہم الغنى بمالہ، والشجاع بشجاعتہ في سبيل الله، وأن يكون المسلمون متظاہرين كاليد الواحد: المؤمنون تتكافأ دماؤہم ويسعى بذمتہم أدناہم وہم يدعلى من سواہم. (الجامع لاحكام القرآن: ٣٣/٦)

وقال ابن كثير: يأمر تعالىٰ عباده المؤمنين بالمعاونة على فعل الخيرات وہو البر وترک المنكرات وہو التقوى... عن أنس رضي الله عنه قال: قال رسول الله صلى الله عليہ وسلم: انصر أخاک ظالماً أو مظلوماً. قيل: يا رسول الله ہذا نصرتہ مظلوماً، فكيف انصره ظالماً؟ قال: تمنعہ من الظلم فذاک نصرک إياه. (تفسير ابن كثير: ٧/٢)

Hadrat Muftī Muhammad Shafī' Sāhib rahimahullāh writes:

The Qur'ān passes a judicious judgement on a basic and fundamental issue which is the soul of the entire world, and on which depends not only its entire success and wellness, but even its life and existence. It is

the issue of mutual assistance and helping each other. The entire system of this world rests on mutual assistance. If one human does not help another, then a person – no matter how intelligent, powerful or wealthy he may be – will not be able to acquire his life's needs single-handedly.[1]

قال الله تعالیٰ: وافعلوا الخير لعلكم تفلحون.

عَنِ ابْنِ عُمَرَ رَضِيَ اللهُ عَنْهُ أَنَّ رَسُوْلَ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ قَالَ: اَلْمُسْلِمُ أَخُو الْمُسْلِمِ، لَا يَظْلِمُهُ وَلَا يُسْلِمُهُ، مَنْ كَانَ فِيْ حَاجَةِ أَخِيْهِ كَانَ اللهُ فِيْ حَاجَتِهِ، وَمَنْ فَرَّجَ عَنْ مُسْلِمٍ كُرْبَةً فَرَّجَ اللهُ عَنْهُ كُرْبَةً مِنْ كُرَبِ يَوْمِ الْقِيَامَةِ، وَمَنْ سَتَرَ مُسْلِمًا سَتَرَهُ اللهُ يَوْمَ الْقِيَامَةِ.[٢]

Hadrat Ibn ʽUmar radiyallāhu ʽanhu narrates that Rasūlullāh sallallāhu ʽalayhi wa sallam said: "A Muslim is a brother of another Muslim. He neither wrongs him nor hands him over to the enemy. Whoever fulfils the need of a Muslim, Allāh taʽālā will fulfil his need. Whoever removes a difficulty from a Muslim, Allāh taʽālā will remove from him one of the difficulties of the day of Resurrection. Whoever conceals [the fault of] a Muslim, Allāh taʽālā will conceal his fault on the day of Resurrection."

وعن أبي هريرة رضي الله عنه عن النبي صلى الله عليه وسلم قال: من نفس عن مؤمن كربة من كرب الدنيا، نفس الله عنه كربة من كرب يوم القيامة، ومن يسر على معسر يسر الله عليه فى الدنيا والآخرة، ومن ستر مسلماً ستره الله فى الدنيا والآخرة، والله في عون العبد ما كان العبد في عون

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[1] *Maʽārif al-Qur'ān*, vol. 3, p. 20.

[2] البخاري: ٢٤٤٢. مسلم: ٢٥٨٠، واللفظ له.

أخيه. (رياض الصالحين: ١/٦٠٥، باب قضاء حوائج المسلمين، دار السلام)

> Rasūlullāh sallallāhu ʿalayhi wa sallam said: "The one who removes from a believer one of the difficulties of this world, Allāh taʿālā shall remove from him one of the difficulties on the day of Resurrection. Allāh taʿālā shall bring ease in this world and in the Hereafter to the one who brings ease to a person in hardship. Allāh shall conceal the faults of a person in this world and the Hereafter if he conceals the faults of a Muslim. Allāh helps a person as long as he is occupied in helping his brother."

Kitāb al-Fatāwā:

A few people get together and contribute a pre-determined amount. They draw a lot and the person whose name comes out receives the entire amount. In this way, they take turns to receive the full amount. For example, ten people contribute ten thousand monthly. One of the participants receives the full amount of 100 000 each month. It is permissible to do this. It is akin to giving a loan to each other. In other words, the one whose name appears first is as though nine of his companions gave him a loan of ninety thousand. This system is not only permissible but recommended. Through it, people can become self-reliant.[1]

Allāh taʿālā knows best.

[1] *Kitāb al-Fatāwā*, vol. 5, p. 343.

GAMBLING AND BRIBERY

Taking part in horse races

Question

A person takes part in horse races and has received prizes on several occasions. From these monies which he received, he opened a shop in which he sells foods, drinks, groceries and so on. He now wants to open more businesses with this money. Is it correct for him to take part in the horse races and accept the prizes? If his income is not halāl, will it be permissible to do business in these shops?

Answer

If a person takes part in horse races where there is the possibility of losing and winning, and where there is the precondition of putting down money [bets] from both parties, and receiving a prize – then this is harām. It is gambling. The Qur'ān prohibits it. It is not permissible to open a business with the money which was received as a prize. One should also abstain from doing business with such a shop.

Yes, if from the two parties, the condition of giving a prize is made by only one person and not by the other, it will be permissible. Similarly, if someone other than those who are competing is giving the prize, it will be permissible.

The Qur'ān states:

يٰأَيُّهَا الَّذِيْنَ اٰمَنُوْآ إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلاَمُ
رِجْسٌ مِّنْ عَمَلِ الشَّيْطٰنِ فَاجْتَنِبُوْهُ لَعَلَّكُمْ تُفْلِحُوْنَ.

> O believers! Wine, gambling, idols and divining arrows are vile deeds of Satan. Continually abstain from them, then, so that you may gain salvation.[1]

Faqīh Abū al-Layth Samarqandī writes:

وقال عطاء ومجاهد: الميسر القمار كله حتى لعب الصبيان بالجوز والكعاب.
(تفسير السمرقندى: ١/٢٠٣)

[1] Sūrah al-Mā'idah, 5: 90.

التعريفات الفقهية:

القمار مصدر قامر هو كل لعب يشترط فيه غالباً أن يأخذ الغالب شيئاً من المغلوب، وأصله أن يأخذ الواحد من صاحبه شيئاً فشيئاً فى اللعب ثم عرفوه بأنه تعليق الملک على الخطر والمال فى الجانبين. (التعريفات الفقهية، ص ١٧٧، وجواهر الفقه: ٢٢٧/٢، وامداد الفتاوى: ١٦١/٣)

رد المحتار:

وسمى القمار قماراً لأن كل واحد من المقامرين ممن يجوز أن يذهب ماله إلى صاحبه، ويجوز أن يستفيد مال صاحبه، وهو حرام بالنص. (رد المحتار: ٤٠٣/٦، كتاب الحظر والاباحة، سعيد)

الفتاوى الهندية:

(والمسابقة) بالفرس والإبل والأرجل والرمي جائزة وحرم شرط الجعل من الجانبين، لا من أحد الجانبين، ومعنى شرط الجعل من الجانبين أن يقول إن سبق فرسک فلک علي كذا، وإن سبق فرسي فلي عليک كذا، وهو قمار فلا يجوز. وإذا شرط من جانب واحد بأن يقول إن سبقتني فلک على كذا، وإن سبقتک فلا شيء لي عليک جاز استحساناً. (الفتاوى الهندية: ٤٤٥/٦، مسائل شتىٰ)

تكملة البحر الرائق:

قال رحمه الله (والمسابقة بالفرس ...جائزة وحرم شرط الجعل من الجانبين لا من أحد الجانبين، لما روى ابن عمر رضي الله عنه أن النبي صلى الله عليه وسلم سبق بالخيل وراهن، ومعنى شرط الجعل من الجانبين أن يقول إن سبق فرسک فلک على كذا، وإن سبق فرسي فلي عليک كذا، وهو قمار فلا يجوز،

لأن القمار من قمر الذي يزاد تارة وينقص أخرى، وسمى القمار قماراً لأن كل واحد من القمارين ممن يجوز أن يذهب ماله إلى صاحبه ويجوز أن يستفيد مال صاحبه فيجوز الازدياد والنقصان في كل واحد منهما فصار ذلك قماراً وهو حرام بالنص. (تكملة البحر الرائق: ٤٨٦/٨، مسائل شتى، كوئته)

وللاستزادة انظر: (رد المحتار على الدر المختار: ٧٥٢/٦، سعيد. وتبيين الحقائق: والجوهرة النيرة)

Islāmī Fiqh:

Just as all types of interest transactions are harām, all types of gambling transactions are harām. Whether the gambling is through races, on the basis of certain conditions, or a person acquires incidental benefit from it; all these forms are unlawful. The Qur'ān and Hadīth classify maysir (gambling) as harām.[1]

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

The current forms of horse racing, where a horse race is hosted by a company, the horses belong to the company, the jockeys are employed by it, the general public places bets on the horse numbers for which it has to pay a fee, and if a horse whose number the person placed a bet on comes out first, he receives a prize while all the others who had paid the fees have them forfeited...This is absolutely harām. First of all, this race has nothing to do with developing the ability to wage jihād. The organizers neither maintain the horses nor do they have anything to do with the training of the jockeys. The recompense or payment system is such that the one who placed the bet receives a cash prize while others have to lose their monies which they paid as fees. This is clear-cut gambling which is explicitly forbidden by the Qur'ān.[2]

Further reading: *Jadīd Fiqhī Masā'il*, vol. 1, p. 263.

Allāh taʿālā knows best.

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[1] *Islāmī Fiqh*, vol. 2, p. 354.

[2] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 2, p. 73.

A muhallil in a horse race

Question

Zayd and ʿUmar have a horse race against each other. They lay down the condition that the one who wins shall receive R10 000 from the other. This is unlawful. We learn from a Hadīth that if a muhallil (the one who creates permissibility) is included, it becomes permissible to lay down a condition. How is a muhallil included?

Answer

There are two ways in which a muhallil can be included into a horse race.

(1)

Zayd and ʿUmar say to a muhallil: “If you win, you will receive the amount which we agreed on. If you lose, you will not give the winner anything. Instead, the winner will take the specified amount from his competitor. From this, four scenarios are possible:

1. If the muhallil wins, he will receive R20 000.
2. If either one from Zayd or ʿUmar wins, he will receive the R10 000 of the other one. The muhallil will receive nothing.
3. Zayd and ʿUmar are equal in winning from the muhallil. Both of them will receive nothing.
4. The muhallil and one of the two – Zayd or ʿUmar – are equal in winning. There is difference of opinion in this regard. ʿAllāmah Shāmī rahimahullāh says that the muhallil will receive nothing. The other person will receive the agreed amount of R10 000. Mullā ʿAlī Qārī rahimahullāh says that the prize will be divided equally between the muhallil and the other person.

تبيين الحقائق:

وصورة إدخال المحلل أن يقولا للثالث إن سبقتنا فالمالان لک و إن سبقناک فلا شيء لنا عليک ولکن الشرط الذي شرطاه بينهما وہو أيهما سبق کان لہ الجعل على صاحبہ باق على مالہ فإن غلبهما أخذ المالين وإن غلباه فلا شيء لهما عليہ ويأخذ أيهما غلب المال المشروط لہ من صاحبہ. (تبيين الحقائق: ٦/٢٢٨، ملتان)

الدر المختار:

... إلا إذا أدخلا ثالثاً محللاً بينهما... ثم إذا سبقهما أخذ منهما وإن سبقاه لم يعطهما وفيما بينهما أيهما سبق أخذ من صاحبه. (الدر المختار: ٤٠٣/٦، سعيد)

الفتاوى الهندية:

ثم إذا كان المال مشروطاً من جانبين فأدخلا بينهما ثالثاً وقال للثالث إن سبقتنا فالمالان لك وإن سبقناك فلا شيء لنا يجوز استحساناً... وإن سبقناه على التعاقب فالذي سبق صاحبه يستحق المال على صاحبه وصاحبه لا يستحق المال عليه. (الفتاوى الهندية: ٣٢٤/٥)

وللاستزادة انظر: (عمدة القارى: ١٩٢/١٠، ط: ملتان، ورد المحتار: ٧٥٢/٦، سعيد، والفتاوى السراجية، ص ٣٣٦، والبحر الرائق: ٤٨٢/٨)

فتاوى الشامى:

وإن سبقاه وجاءا معاً فلا شيء لواحد منهما وإن سبق المحلل مع أحدهما ثم جاء الآخر فلا شيء على من مع المحلل بل له ما شرطه الآخر له كما لو سبق ثم جاء المحلل ثم جاء الآخر فلا شيء للمحلل. (فتاوى الشامى: ٤٠٣/٦، سعيد)

مرقاة المفاتيح:

وإن جاء المحلل و أحد المستبقين معاً ثم جاء الثاني مصلياً أخذ السابقان سبقه. (مرقاة المفاتيح: ٣٢٠/٧، ملتان)

(2)

Zayd and ʽUmar say to the muhallil: "If you win, you will not receive anything. If you lose, you won't have to give us anything. The one who wins from us two [Zayd and ʽUmar] will receive ten thousand from the other." Here too, the sin of gambling will not be committed.

Jawāhir al-Fiqh:

Two riders get a third rider – e.g. Khālid – to join them in the race...The condition is that if Zayd wins, ʿUmar will give him one thousand rupees. If ʿUmar wins, Zayd will give him the same amount. If Khālid wins, no one will have to pay anything to anyone.[1]

(وكذا فى الفقه المعاملات: ٧٢/٢، واشرف التوضيح شرح مشكوٰة المصابيح: ٥٦٨/٢)

Like the first option, four scenarios are possible here:

The second two are the same. In the first option, when the muhallil wins, he will not receive anything. Here too he will receive nothing. However, the precondition is that the horse of the muhallil will have to be of the same standard as the other two. In other words, it has the possibility of winning and losing. Its winning or losing must not be definitive. If not, it will be classified as gambling.

عن أبي هريرة رضي الله عنه عن النبي صلى الله عليه وسلم قال: من أدخل فرساً بين فرسين يعني وهو لا يؤمن أن يسبق فليس بقمار، ومن أدخل فرساً بين فرسين وقد أمن أن يسبق فهو قمار. (رواه ابو داود، ص ٣٥٥)

وللاستزادة انظر: (تبيين الحقائق: ٢٢٧/٦، ملتان، الفتاوى الهندية: ٣٢٤/٥. وبدائع الصنائع: ٢٠٦/٦، سعيد)

Allāh taʿālā knows best.

Receiving a prize on behalf of a third person

Question

A school is hosting a function for which there is a R50 entrance fee. This money will go towards assisting the school. It has not been imposed by the owner of the school, but by a third person. Lots will be drawn and a few prizes will be given to the winners. For example, a mobile phone. If the prize is won by those who are collecting the entrance fees, will it be permissible for them to accept the prize?

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[1] *Jawāhir al-Fiqh*, vol. 2, p. 355.

Answer

If those who are collecting the entrance fees win the prize, it is permissible for them to accept it. There are two reasons for this:

1. The prize is not given in return for the R50, because this amount is an entrance fee. And it is to assist the school, it is not in exchange for the prize. This is why it is permissible.
2. The prize is sponsored by a third person and not by the owner of the school. It is permissible to accept a prize from a third person.

وكذلك (أى لا بأس به) ما يفعله السلاطين وهو أن يقول السلطان لرجلين: من سبق منكما فله كذا فهو جائز لما بينا أن ذلك من باب التحريض على استعداد أسباب الجهاد خصوصاً من السلطان. (بدائع الصنائع: ٦/٢٠٦، كتاب السباق، سعيد-وفتاوى الشامى: ٥/٣٥٤، سعيد)

In the above quotation, the king is like a third person. Just as it is permissible for the king to give the prize, in the scenario under question, it is permissible for a third person to give the prize.

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

There is a lawful way of giving a recompense in a horse race: Two persons are competing against each other. Neither of them is to give anything to the other. Rather, the government, a third person or a group offers to give a prize to the one who wins.[1]

Further reading: *Jawāhir al-Fiqh*, vol. 2, p. 356.

Allāh taʿālā knows best.

Prize bonds

Question

The following is one of the ways in which a prize bond operates: People contribute R10 each, one person or few persons then receive a prize. The remaining contributors lose their money. This is one type of gambling. The other type is where the R10 which was paid initially is returned. A lot is drawn and some people receive prizes. Here, it seems that there is no gambling because the initial money is not lost. Also, it

[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 2, p. 71.

does not appear to be usury because it is defined as "a preconditioned additional amount which is devoid of a recompense". In this case, no condition is made with each person individually – that you will receive such and such additional amount. What is the Sharīʿah ruling with regard to the second type which I described?

Answer

Both types of prize bonds are unlawful.

Islām Aur Jadīd Maʿāshī Masā'il:

Some scholars say that a prize bond is permissible. They looked at it from the angle that it does not entail taʿlīq at-tamlīk ʿalā al-khaṯar (placing one's possession in danger). No matter what amount of money a person contributes, it will be returned to him. This is why it is not gambling. It is therefore permissible. However, this way of thinking is incorrect. Although there is no direct gambling, there is usury in it. If the person's name comes out in the draw, then – if, for example, he contributed one hundred rupees – he will receive 100 100 rupees.

Some scholars are confused into assuming that this too is not usury because when the person bought the bonds, there was no precondition of receiving more.

The answer to this confusion is that the condition of receiving more is made collectively with all those who bought the bonds. Although it is not stated explicitly that we will give any profits over and above it, it is done in practice. This practice is continuous and adhered to that when a person takes back his loan, the government gives him something extra. Although the precondition is not stated in words, it falls under the principle of المعروف كالمشروط.

Generally, the government adds interest to every person who takes out a bond. The interest of all participants is brought together and then distributed among individuals by drawing a lot. We could put this in another way by saying that usury is distributed in the form of gambling. Although it is not gambling because usury is not owned in the first place, it contains the spirit of gambling; and the gambling is taking place over the usury. That is, the interest of one person or the interest of many persons is brought together, and another person receives it through a lot. This is why it is unlawful.[1]

[1] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 4, pp. 11-78.

Fatāwā Bayyināt:

It is haram to trade in prize bonds, and to accept prizes from them.

Jadīd Fiqhī Masā'il:

The first type of prize bonds is included in gambling, and therefore unlawful. The second type is unlawful because it includes usury. It is therefore necessary to abstain from both forms.

Jadīd Mu'āmalāt Ke Shar'ī Ahkām:

A scheme comprises of 250-300 people. Each member contributes three hundred rupees monthly. A lot is drawn each month. The person whose name is drawn receives fifteen thousand rupees or other items to that value. The remaining portions are not taken.

There are two possibilities in this scheme. Each member will definitely receive a prize money or there is the danger of losing his entire amount. If he will definitely receive an amount, it is usury because those who join the scheme do so with the intention of getting their money back, plus an additional amount. Those who run the scheme also encourage and push people into joining it by saying that those whose names come out in the draw shall receive an additional amount. If there is the danger of the original contribution being lost, then this is gambling. Usury and gambling are both harām. It is obligatory to abstain from them.[1]

It is gauged from a detailed fatwā of Hadrat Muftī Nizām ad-Dīn Sāhib rahimahullāh (*Muntakhabāt Nizām al-Fatāwā*, vol. 1, p. 195) that the second type in which the participants receive the full amount which they paid is not classified as usury, so it is permissible to accept it. This ruling will be clarified further on.

Allāh ta'ālā knows best.

Accepting a prize for solving a puzzle in a newspaper

Question

Newspapers often publish a quiz or puzzle. If it is solved, the person will receive a certain prize. There are no fees for this competition. Is it permissible to accept the prize? Yes, the person has to buy the newspaper.

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[1] *Jadīd Mu'āmalāt Ke Shar'ī Ahkām*, vol. 1, p. 264.

Answer

It is permissible to accept a prize for solving a quiz or puzzle in a newspaper. There is no objection to it. It is a one-sided prize; there is neither gambling nor usury in it. As for the money which is paid for the newspaper, the person received the newspaper in return.

تنوير الابصار:

حل الجعل إن شرط المال من جانب واحد... وفى الشامية: جواز الجعل فيما ذكر استحسان. (تنوير الابصار مع فتاوى الشامى: ٤٠٢/٦، كتاب الحظر والاباحة، سعيد)

الفتاوى الهندية:

وحرم شرط الجعل من الجانبين، لا من أحد الجانبين،... وإذا شرط من جانب واحد بأن يقول إن سبقتني فلك على كذا، وإن سبقتك فلا شيء لي عليك جاز استحساناً. (الفتاوى الهندية: ٤٤٥/٦، مسائل شتىٰ)

Fatāwā Mahmūdīyyah:

A newspaper published that if the meaning of a certain word or a certain quiz is solved, the person will receive a prize. A person solved it and received a prize. This prize now belongs to him...There is no objection to it because it is a one-sided thing.[1]

Fatāwā ʿUthmānī:

If no fees were collected from children for participating in a competition or draw, then it is not gambling. It is permissible to draw lots for the distribution of prizes.[2]

Halāl Wa Harām:

If no fees are collected from those taking part in the competition, it will be permissible. The amount which will be received will be classified as a prize.[3]

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[1] *Fatāwā Mahmūdīyyah*, vol. 16, p. 443.

[2] *Fatāwā ʿUthmānī*, vol. 3, p. 342.

[3] *Halāl Wa Harām*, p. 381.

Further reading: *Mālī Muʿāmalāt Parr Gharar Ke Atharāt*, p. 401.

Allāh taʿālā knows best.

Competitions which require a payment

Question

A competition is announced in which participants have to solve a puzzle but have to pay a fee to enter it. A lot is drawn and the winning entry receives a prize. Is it permissible to enter competitions of this nature? Is it permissible to accept the prize which is given?

Answer

If those who are running the competition ask for an entrance fee, then this is classified as gambling, and therefore harām. It is not permissible to enter such competitions. It is necessary for us to abstain from them. If a person enters such a competition mistakenly and wins the prize, it will be obligatory to give the entire amount into charity. He will not be permitted to use it.

The Qur'ān states:

> يٰأَيُّهَا الَّذِيْنَ اٰمَنُوْآ إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلاَمُ رِجْسٌ مِّنْ عَمَلِ الشَّيْطٰنِ فَاجْتَنِبُوْهُ لَعَلَّكُمْ تُفْلِحُوْنَ.
>
> O believers! Wine, gambling, idols and divining arrows are vile deeds of Satan. Continually abstain from them, then, so that you may gain salvation.[1]

Faqīh Abū al-Layth Samarqandī writes:

وقال عطاء ومجاهد: الميسر القمار كله حتى لعب الصبيان بالجوز والكعاب. (تفسير السمرقندى: ١/٢٠٣)

التعريفات الفقهية:

القمار مصدر قامر هو كل لعب يشترط فيه غالباً أن يأخذ الغالب شيئاً من المغلوب، وأصله أن يأخذ الواحد من صاحبه شيئاً فشيئاً فى اللعب ثم عرفوه

[1] Sūrah al-Mā'idah, 5: 90.

بأنہ تعليق الملک على الخطر والمال فى الجانبين. (التعريفات الفقہية، ص ١٧٧، وجواہر الفقہ: ٢/٢٢٧، وامداد الفتاوى: ٣/١٦١)

<u>رد المحتار:</u>

وسمى القمار قماراً لأن كل واحد من المقامرين ممن يجوز أن يذہب مالہ إلى صاحبہ، ويجوز أن يستفيد مال صاحبہ، وہو حرام بالنص. (رد المحتار: ٦/٤٠٣، كتاب الحظر والاباحة، سعيد)

Āp Ke Masā'il:

The entrance fees are paid with a view to increasing one's chances of winning, and winning as much as possible. This is therefore interest. Furthermore, there is no guarantee of winning the prize. This is gambling. Interest and gambling are both <u>h</u>arām. Whether the additional amount which is won is in the form of cash, a ticket or something else – all are <u>h</u>arām. The fundamental objective of the competitions is to win as much as possible. The objective is not to increase one's knowledge. Also, it increases the habit and urge to gamble. We could refer to it as a "noble" form of gambling.[1]

Jawāhir al-Fiqh:

Different types of puzzles are advertised. A person sends a solution with the entrance fee of one rupee for example. A lot is drawn for all the correct entries, and a prize is given to the one whose name comes out...This is clear-cut gambling. One person pays a fee on the premise that he will either lose the one rupee which he paid or win the prize and receive thousands of rupees. The Sharī'ah refers to this as qimār (gambling).[2]

Fatāwā 'Uthmānī:

If any fee is stipulated for taking part in a puzzle/competition, then it is <u>h</u>arām because it is classified as gambling.[3]

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[1] *Āp Ke Masā'il Aur Oen Kā <u>H</u>ull*, vol. 6, p. 261.

[2] *Jawāhir al-Fiqh*, vol. 2, p. 349.

[3] *Fatāwā 'Uthmānī*, vol. 3, p. 341.

Someone may say that the fee is only for entering the competition and not in exchange for the prize. Hadrat Muftī Mahmūd Hasan Sāhib rahimahullāh says in response:

Everyone knows that entrance is not the only objective, due to which a person is prepared to pay it. Rather, the objective is to acquire the amount which has been named a "prize"...Everyone also knows that the objective of the one giving the prize is not merely to fill a space nor to fulfil any specific purpose. It is solely to accumulate a large sum of money while offering the incentive of a prize.[1]

Allāh taʿālā knows best.

Taking part in a bank competition

Question

A certain bank in South Africa innovated a new type of bank account in which it does not pay interest. Instead, whoever opens the account is automatically entered into a competition in which the person could win R100 000. If a person wins, will it be permissible to accept this money?

Answer

If the deposited amount will definitely remain as it is, and the depositor receives an additional amount, then this is interest according to some scholars. If the deposited amount is forfeited, then this is clear-cut gambling. Both are harām in the Sharīʿah.

The Qur'ān states:

يٰأَيُّهَا الَّذِيْنَ اٰمَنُوْآ إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِّنْ عَمَلِ الشَّيْطٰنِ فَاجْتَنِبُوْهُ لَعَلَّكُمْ تُفْلِحُوْنَ.

> O believers! Wine, gambling, idols and divining arrows are vile deeds of Satan. Continually abstain from them, then, so that you may gain salvation.[2]

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[1] *Fatāwā Mahmūdīyyah*, vol. 16, p. 442.

[2] Sūrah al-Mā'idah, 5: 90.

رد المحتار:

وسمی القمار قماراً لأن كل واحد من المقامرين ممن يجوز أن يذهب ماله إلى صاحبه، ويجوز أن يستفيد مال صاحبه، وهو حرام بالنص. (رد المحتار: ٤٠٣/٦، كتاب الحظر والاباحة، سعيد)

Islām Aur Jadīd Maʿāshī Masā'il:

Some scholars say that a prize bond is permissible. They looked at it from the angle that it does not entail taʿlīq at-tamlīk ʿalā al-khaṭar (placing one's possession in danger). No matter what amount of money a person contributes, it will be returned to him. This is why it is not gambling and is therefore permissible. However, this way of thinking is incorrect. Although there is no direct gambling, there is usury in it. If the person's name comes out in the draw, then – if, for example, he contributed one hundred rupees – he will receive 100 100 rupees.

Some scholars are confused into assuming that this too is not usury because when the person bought the bonds, there was no precondition of receiving more.

The answer to this confusion is that the condition of receiving more is made collectively with all those who bought the bonds. Although it is not stated explicitly that we will give any profits over and above it, it is done in practice. This practice is continuous and adhered to that when a person takes back his loan, the government gives him something extra. Although the precondition is not stated in words, it falls under the principle of المعروف كالمشروط.[1]

Other scholars say that this amount is not interest because the bank said that it is not interest. As for the prize which is given, it is a prize; it is not interest. As for the principle of كل قرض جر نفعا فهو ربا this applies if a precondition is made. Here, there is no precondition that "I alone will receive the prize". In fact, every participant does not receive the prize. It is therefore not a precondition. The principle of كل قرض جر نفعا فهو ربا also contains the words إذا كان مشروطا (if it is preconditioned).

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[1] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 4, pp. 11-78.

وفى الذخيرة: إن لم يكن النفع مشروطاً فى القرض فعلى قول الكرخى لا بأس به. (فتاوى الشامى: ١٦٦/٥، مطلب كل قرض جر نفعاً حرام، سعيد)

قال الجرجانى فى التعريفات: الربا: هو فى اللغة: الزيادة، وفى الشرع: هو فضل خالٍ عن عوض شرط لأحد العاقدين. (التعريفات، ص ١١٢، بيروت)

وفى الهداية: لأن الربا: هو الفضل المستحق لأحد المتعاقدين فى المعاوضة الخالى عن عوض شرط فيه. (الهداية: ٧٨/٣، باب الربا)

Hadrat Muftī Nizām ad-Dīn Sāhib rahimahullāh writes:

Question: What do the 'ulamā' say about the following. The post office has a scheme where a person deposits one pound, five pounds, or whatever amount; and receives a receipt for the deposit. No interest is paid. He can withdraw the money whenever he wants when he produces the receipt. Every month, the newspapers publish certain numbers, where a person who deposited one pound, receives one hundred pounds. Is it permissible for a person to accept the amount which is more than what he deposited? He still receives the full amount which he deposited.

Answer: ...Hadrat Muftī Sāhib rahimahullāh said that it is permissible to receive the additional amount because when he deposited his money, there was no agreement that he will receive an additional amount and the transaction will be non-usurious. There is no certainty in receiving the extra amount, the person cannot demand the extra amount, and everyone does not receive the extra amount. Rather, the post office merely announces the distribution of the extra amount according to whatever rules it has laid down, and as per the numbers [of the receipts] which are announced. One of the persons whose name appears receives the extra amount. No one else has the right to demand it. The additional amount cannot be classified as "a debt which draws profits". The additional amount cannot be classified as usury.

Yes, it is another matter if a person adopts piety. This is obviously the better thing to do. Piety will demand that he does not leave that additional money in the Post Office. Instead, he withdraws it and spends it on the poor or in some other charitable or welfare work.[1]

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[1] *Muntakhabāt Nizām al-Fatāwā*, vol. 1, pp. 194-195.

In short, although some scholars do not include it as usury, it is better to abstain from transactions of this nature.

Allāh taʽālā knows best.

A fishing competition

<u>Question</u>

An area on the sea-shore is demarcated and a fishing competition is held there. Participants have to pay an entrance fee. Those who catch the largest fishes are given prizes from the monies which were collected as entrance fees. Is this permissible? Is it permissible to accept the prize, bearing in mind that some people do not receive anything?

<u>Answer</u>

This is included as gambling and is therefore unlawful. Observe the following definitions of gambling:

<u>التعريفات الفقهية:</u>

القمار مصدر قامر هو كل لعب يشترط فيه غالباً أن يأخذ الغالب شيئاً من المغلوب، وأصله أن يأخذ الواحد من صاحبه شيئاً فشيئاً فى اللعب ثم عرفوه بأنه تعليق الملک على الخطر والمال فى الجانبين. (التعريفات الفقهية، ص ١٧٧، وجواهر الفقه: ٢/٢٢٧، وامداد الفتاوى: ٣/١٦١)

<u>رد المحتار:</u>

وسمى القمار قماراً لأن كل واحد من المقامرين ممن يجوز أن يذهب ماله إلى صاحبه، ويجوز أن يستفيد مال صاحبه، وهو حرام بالنص. (رد المحتار: ٦/٤٠٣، كتاب الحظر والاباحة، سعيد)

Ahsan al-Fatāwā:

Question: The Red Crescent is a Pakistani organization which sells tickets for three and four rupees. At the end of each month, it distributes 150 000 rupees and 300 000 rupees as prizes...Is it permissible to buy these tickets, and then accept the prizes?

Answer: This is a combination of usury and gambling, and is therefore <u>h</u>arām.[1]

Taqrīr Tirmidhī:

The third type of gharar is تعليق التمليك على الخطر. This means to suspend ownership to an event which could or could not occur....This is why this transaction is impermissible. It is called تعليق التمليك على الخطر and also known as qimār (gambling). In qimār, the payment of money from one party is certain, while the receipt of a recompense for the other party is uncertain; it is only probable. This is why qimār is also included in gharar.

Yes, if arrangements are made for people to sit there, food and drinks are provided, etc. then the entrance fee can be considered to be in exchange for these provisions. Thereafter, prizes can be given to those who come out first, second and third. There seems to be no objection to this.

Allāh taʿālā knows best.

Taking part in a Vodacom competition

<u>Question</u>

Many companies have competitions in which expensive prizes are given. Vodacom has one such competition. Participants must send an SMS message for which they are charged R10. At the end of the day, a lot is drawn and the one whose name is drawn receives a BMW vehicle to the value of R250 000.

Many Muslims participate enthusiastically in competitions of this nature. Is it permissible to take part in such a competition? If a person wins the car, is it permissible for him to accept it?

<u>Answer</u>

This competition entails gambling. It is therefore not permissible to take part in it and to accept the prize. If a person wins the car, he will have to sell it, and it will then be obligatory on him to give the money in charity. He is permitted to accept only that amount of money which he had paid as an entrance fee.

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[1] *A<u>h</u>san al-Fatāwā*, vol. 7, p. 26.

يٰأَيُّهَا الَّذِيْنَ اٰمَنُوْآ إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِّنْ عَمَلِ الشَّيْطٰنِ فَاجْتَنِبُوْهُ لَعَلَّكُمْ تُفْلِحُوْنَ.

O believers! Wine, gambling, idols and divining arrows are vile deeds of Satan. Continually abstain from them, then, so that you may gain salvation.[1]

وعن عبد الله بن عمرو رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم: إن الله حرم على أمتى الخمر والميسر. (مسند احمد: ٢\٣٥١\٥٦١١، بيروت، وسنن ابى داود، ص ٣٢٧، باب ما جاء فى السكر)

رد المحتار:

وسمى القمار قماراً لأن كل واحد من المقامرين ممن يجوز أن يذهب ماله إلى صاحبه، ويجوز أن يستفيد مال صاحبه، وهو حرام بالنص. (رد المحتار: ٤٠٣/٦، كتاب الحظر والاباحة، سعيد)

احكام القرآن:

إن أهل الجاهلية كانوا يخطرون على المال والزوج وقد كان مباحاً إلى أن ورد تحريمه. (احكام القرآن للجصاص، ٣٢٩/١)

Islām Aur Jadīd Maʿāshī Masā'il:

One type of gharar is تعليق التمليك على الخطر. In a transaction of exchange, ownership is suspended on some danger. Danger means to suspend ownership to an event which could or could not occur. Ownership is suspended on that event in the sense that if it occurs, I will make you an owner of a certain item which I own. It is also known as qimār (gambling).

Qimār is one department of this. In qimār, the payment of money from one party is certain, while the receipt of a recompense for the other party is uncertain. For example, a person says: "Everyone must give me R200 each. I will then draw a lot. I will give R100 000 to the person

[1] Sūrah al-Mā'idah, 5: 90.

whose name is drawn...This is qimār and it is also called maysir...There are various types of lotteries in our times, e.g. a car is displayed at an airport. People are encouraged to buy tickets for R200. Later on, a draw will take place and the one whose number is drawn will receive the car. This is qimār. It is تعليق التمليك على الخطر. It is one type of gharar which is harām.[1]

Further reading: *Fatāwā Mahmūdīyyah*, vol. 16, p. 435; *Ahsan al-Fatāwā*, vol. 7, p. 26; *Muntakhabāt Nizām al-Fatāwā*, vol. 2, p. 302.

Objection: Some people are of the view that the R10 for the SMS message is actually an entrance fee, and the prize from the company is to promote participation. What, then, is the reason for it being impermissible?

Answer: Entrance is not the fundamental objective; winning the prize is. This is why a person bears the burden of paying the fee.

Fatāwā Mahmūdīyyah:

Everyone knows that entrance is not the only objective, due to which a person is prepared to pay it. Rather, the objective is to acquire the amount which has been named a "prize"...Everyone also knows that the objective of the one giving the prize is not merely to fill a space nor to fulfil any specific purpose. It is solely to accumulate a large sum of money while offering the incentive of a prize.[2]

Allāh ta'ālā knows best.

Paying a bribe to obtain a licence

Question

Each time a person goes for his driver's licence, he fails. He learnt that the inspector will not pass him without paying a bribe. Will it be permissible to pay a bribe in such a situation?

Answer

If the person can drive a vehicle confidently and also knows the rules of the road, but is still unsuccessful in passing the licence test and cannot pass without paying a bribe, then due to this compulsion, there is hope that he will not be taken to task in the Hereafter for paying a bribe. Nonetheless, it is unlawful to accept a bribe under all conditions.

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[1] *Islām Aur Jadīd Ma'āshī Masā'il*, vol. 4, p. 76.

[2] *Fatāwā Mahmūdīyyah*, vol. 16, p. 442.

عن أبي هريرة رضي الله عنه قال: لعن رسول الله صلى الله عليه وسلم الراشي والمرتشي. (جامع الترمذی: ١/٢٤٨)

Rasūlullāh sallallāhu ʿalayhi wa sallam cursed the one who pays a bribe and the one who accepts one.

الهداية:

و دفع الرشوة لدفع الظلم أمر جائز. (الهداية: ٣/٢٤٥)

قال الجرجاني فى التعريفات: الرشوة: ما يعطى لإبطال حق أو لإحقاق باطل. (التعريفات، ص ١١٤، والتعاريف للمناوى، ص ٣٦٥)

أو المال الذي يعطى بمقابلة الواجب.

أو ما يأخذه الآخر ظلماً.

أو أخذ الأموال على فعل ما يجب على الآخذ فعله أو فعل ما يجب عليه تركه. (تفسير البحر المحيط: ٤/٥٣٣، ودستور العلماء: ٢/١٣٦)

تكملة فتح القدير:

(قوله ودفع الرشوة لدفع الظلم أمر جائز) هذا دليل عقلي على ما ذهب إليه أئمتنا من جواز الصلح من إنكار أو سكوت أيضاً متضمن للجواب عن دليل عقلي للشافعي مذكور فيما قبل، وهو قوله ولأن المدعى عليه يدفع المال لقطع الخصومة، وهذا رشوة، قال الشراح: لا يقال لا نسلم جواز دفع الرشوة لدفع الظلم لأن قول النبي صلى الله عليه وسلم: لعن الله الراشي والمرتشي، عام لأنا نقول: هذا الحديث محمول على ما إذا كان على صاحب الحق ضرر محض في أمر غير مشروع، كما إذا دفع الرشوة حتى أخرج الوالي أحد الورثة عن الأرث وأما إذا دفع الرشوة لدفع الضرر عن نفسه فجائز للدافع، انتهى، واعترض بعض الفضلاء على الجواب حيث قال فيه، إن المعتبر هو عموم اللفظ وما

الدليل على أنه محمول على ما ذكر غير مجرى على عمومه انتهى، أقول: الدليل عليه ما ورد من النصوص في أن الضرورات تبيح المحظورات منها قوله تعالىٰ: وما جعل عليكم فى الدين من حرج. ولا شك أن في دفع الضرر عن نفسه دفع الحرج. (تكملة فتح القدير: ٤٠٨/٨، كتاب الصلح، دار الفكر)

تبيين الحقائق:

ولو قلنا إنه رشوة فهي جائزة للدافع لدفع الظلم عن نفسه وما جاء فيه من الذم من قوله عليه الصلاة والسلام: لعن الله الراشي والمرتشي، المراد به إذا كان هو الظالم فيدفعها إلى بعض الظلمة من ولاة الأمور يستعين به على الظلم بالرشوة وأما لدفع الضرر عن نفسه فلا شبهة فيه حتى روي عن أبي يوسف أنه أجاز ذلك للوصي من مال اليتيم أيضاً لدفع الضرر عن اليتيم، ألا ترى أن الخضر عليه السلام خرق السفينة كيلا يأخذها الظالم وما كان مراده بذلك إلا الإصلاح والله يعلم المصلح من المفسد. (تبيين الحقائق: ٣١/٥، كتاب الصلح، ملتان)

البحر الرائق:

ومنها إذا دفع الرشوة خوفاً على نفسه أو ماله فهو حرام على الآخذ غير حرام على الدافع وكذا إذا طمع في ماله فرشاه ببعض المال ومنها إذا دفع الرشوة ليسوى أمره عند السلطان حل له الدفع ولا يحل للآخذ أن يأخذ. (البحر الرائق: ٢٦٢/٦، كتاب القضاء، كوئته)

الفتاوى الهندية:

إذا دفع الرشوة لدفع الجور عن نفسه أو أحد من أهل بيته لم يأثم. (الفتاوى الهندية: ٤٠٣/٤)

فتاوى الشامى:

ما يدفع لدفع الخوف من المدفوع إليه على نفسه أو ماله حلال لدافع حرام على الآخذ، لأن دفع الضرر عن المسلم واجب ولا يجوز أخذ المال ليفعل الواجب. (فتاوى الشامى: ٥/٣٦٢، كتاب القضاء، سعيد)

وكذا في (رسائل ابن نجيم الاقتصادية، ص ٢٠٠، وتكملة رد المحتار: ٢/٢٢٢)

Kitāb al-Fatāwā:

If you have a right over a worker in the sense that he has to carry out that task, and – as you stated in your question, the task is lawful and is not intended to wrong anyone – then for you to acquire your lawful right and save yourself from oppression and injustice, there will be leeway for you to pay a bribe while you still consider it to be reprehensible. At the same time, it is ḫarām to accept bribes under all situations.[1]

Fatāwā Maḫmūdīyyah:

It is ḫarām to pay or accept bribes. However, there is leeway to pay a bribe if it is to remove oppression, or acquire your right in a state of compulsion. In such a case, there is room to only pay the bribe; the one accepts the bribe will be sinning.

Jadīd Muʿāmalāt Ke Sharʿī Aḫkām:

Some people pay a bribe to get employment when we know that it is ḫarām to pay or receive a bribe. Some people are forced into paying a bribe. It is difficult for them to obtain employment without a bribe. Government officials place obstacles. In such a situation, if a bribe is paid to repulse oppression, there is hope that Allāh taʿālā will not take the person to task. If the person pays a bribe, obtains employment, then the ruling with regard to his salary is that if he is qualified for that job and is carrying out his responsibilities correctly, then his income is ḫalāl. If he is not qualified for that job or is not fulfilling his responsibilities as was required of him, then his income will not be lawful for him.[2]

Allāh taʿālā knows best.

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[1] *Kitāb al-Fatāwā*, vol. 6, p. 245.

[2] *Jadīd Muʿāmalāt Ke Sharʿī Aḫkām*, vol. 1, p. 179.

Lotteries

Question

In this country and many other countries, various businesses sell tickets with certain numbers on them. People buy these tickets, they are stamped and returned to the buyers. If the stamped tickets together with certain numbers are drawn, the person/s receive large sums of money as prizes. Is it permissible to obtain these sums of money in this way? The tickets are sold at different prices. Some of them cost R50, while others cost R100 or R200.

Similarly, we see children playing marbles in the villages. Here too, the children place their marbles in a circle. They take turns to strike the marbles. The one who strikes them takes all the marbles, while the remaining children lose their respective marbles. Is this permitted in the Sharīʿah?

Answer

Both systems are harām because they entail تعليق التمليك على الخطر (suspending ownership on danger). Payment from one party is certain, while the receipt of a recompense for the other party is uncertain. This is known as qimār (gambling).

يٰأَيُّهَا الَّذِيْنَ اٰمَنُوْآ إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلاَمُ رِجْسٌ مِّنْ عَمَلِ الشَّيْطٰنِ فَاجْتَنِبُوْهُ لَعَلَّكُمْ تُفْلِحُوْنَ.

O believers! Wine, gambling, idols and divining arrows are vile deeds of Satan. Continually abstain from them, then, so that you may gain salvation.[1]

وعن عبد الله بن عمرو رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم: إن الله حرم على أمتى الخمر والميسر. (مسند الامام احمد بن حنبل: برقم ٦٥١١)

Rasūlullāh sallallāhu ʿalayhi wa sallam said: "Allāh prohibited wine and gambling on my followers."

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[1] Sūrah al-Mā'idah, 5: 90.

قال قوم من أہل العلم القمار كلہ من الميسر... وہو السهام التي يجيلونها فمن خرج سہمہ استحق منہ ما توجبہ علامة السهم فربما أخفق بعضهم حتى لا يحظى بشيء وينجح البعض فيحظى بالسہم الوافر، وحقيقتہ تمليک المال على المخاطرة، وہو أصل في بطلان عقود التمليكات الواقعة على الأخطار. (احكام القرآن: ٤٦٥/٢، سہيل اكيڈمى)

<u>احكام القرآن:</u>

وقال عطاء وطاؤس ومجاہد حتى لعب الصبيان بالكعاب والجوز. (احكام القرآن: ٣٢٩/١)

قال الفقيہ أبو الليث السمرقندى: الميسر القمار كلہ حتى لعب الصبيان بالجوز والكعاب. (تفسير السمرقندى: ٢٠٣/١)

<u>تبيين الحقائق:</u>

وحرم لو شرط المال من الجانبين. (تبيين الحقائق: ٣٢/٤، ملتان)

<u>الدر المختار:</u>

وحرم لو شرط فيها من الجانبين لأنہ يصير قماراً - وفي رد المحتار: لأن القمار من القمر الذي يزداد تارة وينقص أخرى، وسمى القمار قماراً لأن كل واحد من المقامرين ممن يجوز أن يذہب مالہ إلى صاحبہ ويجوز أن يستفيد مال صاحبہ وہو حرام بالنص. (الدر المختار مع رد المحتار: ٤٠٣/٦، سعيد)

Kifāyatul Muftī:

It is not permissible to buy or sell lottery tickets. It entails gambling which is <u>h</u>arām.[1]

[1] *Kifāyatul Muftī,* vol. 9, p. 226.

Islām Aur Jadīd Maʿāshī Masā'il:

There are various types of lotteries in our times, e.g. a car is displayed at an airport. People are encouraged to buy tickets for R200. Later on, a draw will take place and the one whose number is drawn will receive the car. This is qimār. It is تعليق التمليك على الخطر. It is one type of gharar which is haram.[1]

Mālī Muʿāmalāt Parr Gharar Ke Atharāt:

In some places, children play with walnuts or marbles. The game entails the winner taking the walnuts or marbles from those who lost. This is included in qimār – gambling.[2]

Further reading: *Nizām al-Fatāwā*, vol. 2, p. 301; *Fatāwā Mahmūdīyyah*, vol. 16, p. 435; *Jadīd Fiqhī Masā'il*, vol. 1, p. 430; *Īdāh an-Nawādir*, vol. 1, p. 123; *Jawāhir al-Fiqh*, vol. 2, pp. 348-350; *Qāmūs al-Fiqh*, vol. 4, p. 524; *Fatāwā Bayyināt*, vol. 4, p. 214; *Mālī Muʿāmalāt Parr Gharar Ke Atharāt*, p. 401.

Allāh taʿālā knows best.

Speculation

Question

Nowadays, speculation has reached its peak among most large companies. Does the Sharīʿah permit it?

Answer

This transaction is not intended to buy shares, but to balance profits and losses on account of the rise and drop in prices. In such a case, neither does the buyer pay any price nor does the seller hand over any goods. It is therefore unlawful.

Speculation is one type of gambling. Sattā bāzī or speculation is defined as: (1) A type of gambling in which conditions are laid down for the application of certain rules. (2) Goods of a trader. (*Fīroze al-Lughāt*, p. 780)

There are two reasons for the prohibition of speculation:

1. It entails the sale of something which is not owned.
2. It entails the sale of something before taking possession of it.

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[1] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 4, p. 77.

[2] *Mālī Muʿāmalāt Parr Gharar Ke Atharāt*, p. 393.

Refer to the following for proofs: *Islām Aur Jadīd Maʿāshī Masāʾil*, vol. 4, pp. 80-82; *Jadīd Fiqhī Mabāhith*; *Islām Aur Jadīd Maʿīshat Wa Tijārat*, pp. 84-114; *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 108; *Fatāwā ʿUthmānī*, vol. 3, p. 186; *Gharar Kī Sūratei*, pp. 371-376.

Allāh taʿālā knows best.

Promoting a business through prizes

Question

In most countries, large businesses draw lots and give prizes to the winners. This is done to promote their business and increase their sales. The one whose name is drawn receives a prize in cash or kind. The buyer pays the full price for whatever item he buys, but the prize is given separately. A few winners are selected from thousands of buyers. Is it permissible to acquire a prize in this way? Some muftīs say that it is unlawful because a prize of this nature entails usury and gambling.

Answer

It is permissible to set aside a prize and for the winner to obtain it due to his name being drawn from the lot. This is neither usury nor gambling. It is not usury because the jurists refer to usury to that additional amount which is not in exchange for something, and the additional amount is not preconditioned in the transaction.

الربا هو الفضل المستحق لأحد المتعاقدين فى المعاوضة الخالي عن عوض شرط فيه. (الهداية: ٣/ ٧٨)

We cannot refer to it as gambling because the jurists say: It is gambling when both parties lay down the condition of putting down some wealth. (تعليق الملك بالخطر من الجانبين)

However, the following conditions will have to be considered:

1. The seller is selling items at a price which is similar elsewhere. In other words, he is selling them for about the same price as sold in other shops. If the seller increases the price of items because of the prize, it will not be permissible and the transaction will be included in gambling.

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

If the items are sold at a higher price because of the prize coupons which are attached to them, and it is possible to buy them elsewhere

at a lesser price because the prize coupons are not attached to them, then it is harām to make efforts to buy those items in the hope of receiving the prize. It is essential for a person to abstain from such transactions because this is classified as gambling which is harām in the Sharīʿah.[1]

2. Some scholars lay down the condition that a buyer must not go for the sake of winning the prize. His fundamental objective must be to buy the item. After that, if he wins the prize, it will be permissible. If he goes with the express purpose of winning the prize, it will be classified as gambling. Hadrat Muftī Shafīʿ Sāhib rahimahullāh writes in *Jawāhir al-Fiqh*:

Now it revolves around the intention. The person who buys this ticket for the sake of winning the prize will be committing the sin of gambling. As for the person who goes solely for the exhibition, and not for the prize, and happens to win the prize; then as per the injunctions, he is out of the ruling of gambling.[2]

Maulānā Khālid Sayfullāh Rahmānī Sāhib writes:

If the buyer went with the purpose of buying goods and happened to receive a prize coupon, and incidentally, his name was drawn from the lot, then there is no reprehensibility in it. If his fundamental objective was to obtain a prize coupon and bought goods with that purpose, then it will not be permissible. It will fall under the ruling of gambling.[3]

However, Muftī Ihsānullāh Shā'iq Sāhib considers the above scenario to be permissible as well. (*Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 126)

To sum up, the view of those who say that it is unlawful is based on caution, while the view of those who permit it is based on concession.

Obtaining a prize coupon is neither usury nor gambling. Observe some proofs and parallels in this regard:

Hadrat Muftī Nizām ad-Dīn Sāhib rahimahullāh writes:

The fact of the matter is that whether the entrant's number comes out or not, he will receive in full the money which he paid in. He can take it back whenever he wants. Also, there is no fear of losing his money. Thus, there is no gambling here. As for the additional amount of

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[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 126.

[2] *Jawāhir al-Fiqh*, vol. 4, p. 566.

[3] *Kitāb al-Fatāwā*, vol. 5, p. 249.

money which he will receive if his number is drawn, will it be classified as usury or not?...At the time of paying in the money, the agreement is that he will not get an additional amount when it is returned to him and that the agreement will not be a usurious one. Since there is no certainty in receiving the additional amount, the person cannot demand it, and everyone does not receive it. Rather, the post office merely announces the distribution of the extra amount according to whatever rules it has laid down, and as per the numbers [of the receipts] which are announced. One of the persons whose name appears receives the extra amount. No one else has the right to demand it...If a person's number is drawn and he therefore receives an additional amount – whether it is one hundred pounds for the one pound with which he bought the ticket – we will not refer to the additional amount as usury.

...after all these discussions, it becomes clear that the additional amount is a donation from the post office, and a donation is permissible; it is not unlawful. Therefore, it will be permissible to accept the additional amount. It is another matter if a person adopts piety and abstains; this will be the better thing to do.[1]

H̲ad̲rat Maulānā Qād̲ī Mujāhidul Islām S̲āh̲ib rah̲imahullāh writes:

This ownership could be unrestricted or preconditioned. For example, "After my death, such and such house is bequeathed to you." This is unrestricted. "If you perform h̲ajj next year, I will bequeath such and such house to you after my death." This is an example of a preconditioned bequest. If the person performs the h̲ajj, he will become the owner of whatever the bequester bequeathed to him after his death. (*Majmūʿah Qawānīn Islāmī*, p. 248). (Even in this form of bequest, there is تعليق الملك على الخطر with respect to one party. After all, no wealth is preconditioned on both sides. In short, it will be gambling when there is a precondition on both sides).

H̲ad̲rat Muftī Taqī S̲āh̲ib writes:

The only condition is that the item which is being sold is being sold at a price which is similar elsewhere...If the seller gives a prize by drawing a lot, it will be a donation which is permissible.[2]

Muftī Iʿjāz Ah̲mad S̲amdānī S̲āh̲ib writes:

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[1] *Muntakhabāt Niz̲ām al-Fatāwā*, vol. 1, p. 194.

[2] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 4, p. 77.

From this fourth condition, we learn the ruling with regard to many of those competitions which companies have for the promotion of their products. If the companies offer their products at the same price as they would be in the case where there is no competition [or lucky draw], it will not be gambling...This is because the buyer received the full recompense for what he paid. Even if his name is not drawn and he does not receive a prize, he will not suffer any loss. If his name is drawn and he receives a prize, it will be nothing but a prize from the company which he will be permitted to accept.[1]

The drawing of lots is permissible. This is because it is permissible on every such occasion which does not entail the invalidating of an obligatory right. Rather, it is used as a means to distinguish and identify rights, or for an initial donation and favour. A lot is drawn to achieve satisfaction of the hearts. Here it is an initial donation and not any person's obligatory right.

قوله: (والقرعة لتطييب القلوب إزاحة الميل) قال الشراح: ہذا جواب الاستحسان، والقياس يأباہا... ولكنا تركنا القياس ہاہنا بالسنة والتعامل الظاہر من لدن رسول الله صلى الله عليه وسلم إلى يومنا ہذا من غير نكير منكر... ألا يرى أن يونس عليه السلام في مثل ہذا استعمل القرعة مع أصحاب السفينة... وكذلك زكريا عليه السلام استعمل القرعة مع الأحبار في ضم مريم إلى نفسه... وكان رسول الله صلى الله عليه وسلم يقرع بين نسائه إذا أراد السفر تطييباً لقلوبهن. (تكملة فتح القدير: ٩/٤٤٠، دار الفكر، وكذا فى العناية على ہامش فتح القدير: ٩/٤٤٠)

Fatāwā ʿUthmānī:

It is permissible to draw lots for the distribution of prizes.[2]

Allāh taʿālā knows best.

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[1] *Mālī Muʿāmalāt Parr Gharar Ke Atharāt*, p. 387.

[2] *Fatāwā ʿUthmānī*, vol. 3, p. 342.

Objections and answers

(1)

Some scholars say that there is doubt as to whether one's name will be drawn or not. It is therefore impermissible on the basis of تعليق الملك على الخطر.

وأما الذي لا يصح تعليقه بالشرط شرعاً فضابطه كل ما كان من التمليكات سواء كان مبادلة المال بمال من الطرفين أو لا كالبيع والإجارة والاستيجار والقسمة والهبة. (شرح مجلة: ٢٣٤/١)

Answer:

It should be borne in mind that the issue of تعليق الملك على الخطر is prohibited when wealth is preconditioned by both parties. This is included in qimār (gambling) by a text of the Qur'ān.

قال الله تعالى: إنما الخمر والميسر... رجس من عمل الشيطان، فاجتنبوه. (المائدة:٩٠). والميسر القمار. وقال فى التعريفات الفقهية: القمار مصدر قامر هو كل لعب بشترط فيه غالباً أن يأخذ الغالب شيئاً من المغلوب وأصله أن يأخذ الواحد من صاحبه شيئاً فشيئاً فى اللعب ثم عرفوه بأنه تعليق الملك على الخطر والمال فى الجانبين. (التعريفات الفقهية، ص: ١٧٧، بيروت)

وفي معجم لغة الفقهاء: القمار... تعليق الملك على الخطر والمال من الجانبين (معجم الفقهاء، ص: ٣٦٩)

وفي تيسير الكريم الرحمن فى تفسير كلام المنان: وأما الميسر فهو كل المغالبات التي يكون فيها عوض من الطرفين. (تيسير الكريم الرحمن، ص: ٨١)

احكام القرآن:

لا خلاف بين أهل العلم في تحريم القمار وأن المخاطرة من القمار قال ابن عباس: إن المخاطرة قمار وإن أهل الجاهلية كانوا يخاطرون على المال والزوجة

وقد كان ذلک مباحاً إلی أن ورد تحریمہ. (احکام القرآن للجصاص: ٣٧٩/١ ،سہیل)

فتاوی الشامی:

لأن القمار من القمر الذی یزداد تارة وینقص أخری وسمی القمار قماراً لأن کل واحد من المقامرین ممن یجوز أن یذہب مالہ إلی صاحبہ ویجوز أن یستفید مال صاحبہ وہو حرام بالنص ولا کذلک إذا شرط من جانب واحد. (فتاوی الشامی: ٦/٤٠٣، وکذا فی البحر الرائق:٤٨٦/٨)

امداد الفتاوی:

تعلیق الملک علی الخطر والمال من الجانبین. (امداد الفتاوی: ١٦١/٣، ومثلہ فی جواہر الفقہ: ٣٤٢/٢)

The case under discussion is not included in تعلیق الملک علی الخطر والمال من الجانبین. The buyer gave over his wealth and got an exchange for it in the form of goods. Now, a condition is laid down only from the seller's side for the name to be drawn from the lot to receive the prize. This is not gambling.

Islām Aur Jadīd Maʿāshī Masā'il:

We must remember one point: Qimār is realized when payment from one party is certain, and uncertain or probable from the other party. Where payment is certain from both parties, and then one party says that I will draw a lot, then this is not qimār...Take the case of two traders. They say: "Whoever buys goods from us, we will give each person a piece of paper and draw a lot later on...This is not qimār.[1]

Muftī Iʿjāz Ahmad Samdānī writes:

If a person acquired a real return for his wealth, and then receives a prize, it is not qimār.[2]

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[1] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 4, p. 76.

[2] *Gharar Ke Atharāt*, p. 386. Also *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 126.

Muftī Taqī ʿUthmānī S̲āh̲ib writes:

If no fees were collected for participating in a competition or draw, then it is not gambling. It is permissible to draw lots for the distribution of prizes.[1]

However, an objectionable point is what was made in *Sharh̲ al-Majallah*: If تعليق الملك بالخطر من جانب واحد is from among the ownerships, then it is also impermissible. What is the answer to this?

If we were to examine the other texts of the author and his other written works, we will conclude that this is not a general rule. There are exclusions to it. We learn from this that it is permissible for one party to lay down a condition even if it contains ownership.

وما كان من الإطلاقات كالإذن بالتجارة وكالوكالة أو الولايات كالقضاء والإمارة... أو ما كان من التحريضات صح تعليقه بالملائم وذلك كقول المولى لعبده إن قبضت لى من فلان الألف التي لي عليه فقد أذنت لک بالتجارة... وإن وصل إليک كتابى فقد عزلتک وكقول الإنسان للدائن إذا جاء مديونک من سفره فأناْ كفيل لما لک عليه... وأما غير الملائم كأن هبت الريح أو دخلت الحمام فلا يصح. (شرح المجلة: ١/٢٣٣)

We learn from the above rule that in matters related to encouragement and promotions, a one-sided condition which is in sync with the agreement is permitted. In the case under discussion, there is an angle of encouragement/promotion in the sense that the businessman wants to promote his business and create an interest in the minds of the customers. Laying down the condition of a prize by drawing a lot is in sync with the agreement. This is why it ought to be permissible.

Furthermore, it is similar to a preconditioned donation (tabarruʿ mashrūt̲) because the prize which the seller is giving is not in exchange for anything. Rather, it is an initial donation; and it is permissible to lay down a condition in a donation. For example, whichever person's name is drawn shall receive a prize. For example, Rasūlullāh s̲allallāhu ʿalayhi wa sallam had laid down the condition of including H̲ad̲rat ʿĀ'ishah rad̲iyallāhu ʿanhā in an invitation which was

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[1] *Fatāwā ʿUthmānī*, vol. 3, p. 342.

extended to him. The father of Barrā’ ra<u>d</u>iyallāhu ‘anhu had laid down a condition with <u>H</u>a<u>d</u>rat Abū Bakr ra<u>d</u>iyallāhu ‘anhu, and so on.

عن أنس رضي الله عنه أن جاراً لرسول الله صلى الله عليه وسلم فارسياً كان طيب المرق فصنع لرسول الله صلى الله عليه وسلم ثم جاء يدعوه، فقال: وهذه لعائشة رضى الله تعالىٰ عنها فقال: لا، فقال رسول الله صلى الله عليه وسلم: لا، فعاد يدعوه، فقال رسول الله صلى الله عليه وسلم:وهذه، قال: لا، قال رسول الله صلى الله عليه وسلم: لا، ثم عاد يدعوه، فقال رسول الله صلى الله عليه وسلم: وهذه، قال: نعم فى الثالثة، فقاما يتدافعان حتى أتيا منزله. (رواه مسلم: ١٧٦/٢)

The gist of the above <u>H</u>adīth: A person invited Rasūlullāh <u>s</u>allallāhu ‘alayhi wa sallam to a meal. Rasūlullāh <u>s</u>allallāhu ‘alayhi wa sallam laid down the condition that <u>H</u>a<u>d</u>rat ‘Ā’ishah ra<u>d</u>iyallāhu ‘anhā should also be included. The man declined. He eventually acquiesced when Rasūlullāh <u>s</u>allallāhu ‘alayhi wa sallam asked him a third time. Rasūlullāh <u>s</u>allallāhu ‘alayhi wa sallam then brought <u>H</u>a<u>d</u>rat ‘Ā’ishah ra<u>d</u>iyallāhu ‘anhā with him.

<u>H</u>a<u>d</u>rat Abū Bakr ra<u>d</u>iyallāhu ‘anhu bought a palanquin for a camel from <u>H</u>a<u>d</u>rat ‘Āzib ra<u>d</u>iyallāhu ‘anhu and said to him: “Tell your son, Barrā’, to take this palanquin for me.” <u>H</u>a<u>d</u>rat ‘Āzib ra<u>d</u>iyallāhu ‘anhu said: “He will take it on condition you relate the story of the Hijrah.” <u>H</u>a<u>d</u>rat ‘Āzib ra<u>d</u>iyallāhu ‘anhu preconditioned the favour of carrying the palanquin with relating the story of the Hijrah, and <u>H</u>a<u>d</u>rat Abū Bakr ra<u>d</u>iyallāhu ‘anhu accepted the condition of relating the story.

عن البراء رضي الله عنه قال: اشترى أبو بكر رضي الله عنه من عازب رضي الله عنه رحلاً بثلاثة عشر درهماً، فقال أبو بكر رضي الله عنه لعازب رضي الله عنه: مر البراء فليحمل إلي رحلي، فقال عازب رضي الله عنه لا، حتى تحدثنا كيف صنعت أنت و رسول الله صلى الله عليه وسلم حين خرجتما من مكة. (رواه البخارى: ٥١٥/١، مناقب المهاجرين)

This prize from the shopkeeper is a donation, it is not in exchange for anything.[1]

Objection: We gauge from the rule stated in *Sharh̲ al-Majallah* that it is not permissible to lay down a one-sided condition in matters related to ownership. A gift (hibah) is also listed among tamlīkāt (items of ownership) even though a hibah is a donation. This would mean that it is impermissible to lay down a condition in donations.

Answer: We learn from a more detailed text of *Sharh̲ al-Majallah* that tamlīkāt which are preconditioned are of two types:

1. A transaction in which wealth is exchanged for wealth.
2. A transaction in which wealth is not exchanged for wealth.

The rules governing each one are different. Transactions of the first type become invalid because of the invalid condition. On the other hand, those of the second type, an invalid condition which is not suited to the transaction is classified as useless (laghw) but valid. In other words, when a gift is given to the person, his ownership over it will be established. Furthermore, we learn from a text of Shāmī that the condition which is spoken about refers to an unsuitable condition. In other words, it is permissible to lay down a suitable condition. And in a hibah, an unsuitable condition becomes invalid.

لكن ما كان فيه مبادلة مال بمال يبطل أيضاً بالشرط الفاسد كالبيع وما ليس كذلك كالهبة والصدقة والإبراء... لا يبطل بالشرط الفاسد بل يصح ويلغو الشرط. (شرح المجلة: ١/٢٣٤)

Donations fall under the second category. Therefore, an unsuitable condition will be laghw while the transaction will be correct.

Note: It seems that *Sharh̲ al-Majallah* has classified all types of conditions to be invalid with respect to conditions. On the other hand, ʿAllāmah Shāmī rah̲imahullāh says that a suitable condition in a donation is valid and permissible while an unsuitable condition is invalid. Therefore, if we consider the text of *Sharh̲ al-Majallah* to refer to an unsuitable condition, the objection will be removed.

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[1] *Jadīd Muʿāmalāt Ke Sharʿī Ah̲kām*, vol. 1, p. 126.

ويصح تعليق هبة وحوالة وكفالة وإبراء عنها بملائم. (الدر المختار: ٥/٢٥٥)

وما يصح ولا يبطل بالشرط الفاسد... قوله والهبة والصدقة كوهبتك هذه المائة أو تصدقت عليك على أن تخدمنى سنة فتصح ويبطل الشرط لأنه فاسد وفى جامع الفصولين ويصح تعليق الهبة بشرط ملائم... ولو مخالفاً تصح الهبة لا الشرط. (الدر المختار مع رد المحتار: ٥/٢٤٩، سعيد)

Even from the previously quoted Ahādīth we learn that it is valid and correct to lay down suitable conditions in donations.

(2)

Winning a prize in a competition involving horse-racing, archery, etc. and also an academic competition fall under the classification of encouragement. The purpose is to improve and progress in a particular field. For example, in the first case [horse-racing and archery], the object is jihād training; and in the second it is to progress academically. On the other hand, the case under question does not aim to progress in any attribute or field.

فيباح فى كل الملاعب أى التى تعلم الفروسية وتعين على الجهاد لأن جواز الجعل فيما مر إنما ثبت بالحديث على خلاف القياس فيجوز ما عداها بدون الجعل. (فتاوى الشامى: ٦/٤٠٢، سعيد)

Answer:

There are three types of occasions when a prize is given:

a) It is a competition which is of benefit. In such a case, it is unanimously considered to be permissible to set aside a one-sided prize. In fact, it is preferred.

b) It is a competition but it neither helps in jihād nor is there any other benefit in it. Setting aside a one-sided prize is not preferred even though the competition is permissible. It is done as a form of encouragement.

c) It falls under the category of donations, encouragements and incentives. If a one-sided prize is set aside, then ʽAllāmah Shāmī rahimahullāh is of the view that it is permissible.

قال ابن عابدين: ألقى شيئاً وقال: من أخذه فهو له فلمن سمعه أو بلغه ذلك القول أن يأخذه... لأنه أخذه على وجه الهبة وقد تمت بالقبض. (فتاوى الشامى: ٤/٢٨٥، سعيد)

Other jurists also permit it.

الفتاوى السراجية:

رجل قال لآخر من أكل من مالى فهو فى حل قيل لا يحل لأحد أن يأكل والفتوى على أنه يحل. (الفتاوى السراجية، ص: ٤٠٣)

الفتاوى الهندية:

إذا وضع الرجل مقداراً من السكر أو عدداً من الدراهم بين قوم وقال من شاء أخذ منه شيئاً أو قال من أخذ منه شيئاً فهو له فكل من أخذ منه شيئاً يصير ملكاً له. (الفتاوى الهندية: ٥/٣٤٥)

(3)

We gauge the verdict of impermissibility from a text of H̲ad̲rat Maulānā Muh̲ammad Yūsuf Ludhyānwī rah̲imahullāh. It reads thus:

...The essence of this business is to buy and sell with the precondition of a prize. The Sharī'ah does not permit buying and selling of this type – where an external condition is laid down in which the benefit goes to one of the two parties.[1]

Answer:

We cannot understand H̲ad̲rat Maulānā's text – that a prize is not preconditioned with trade. If a person does not want to buy a prize coupon, he is not forced to do so. And he can purchase the goods without the coupon. We also do not understand what he means by "buying and selling with the precondition of a prize". Furthermore, the prize is not preconditioned; it is probable. Preconditioned means that every buyer will have a right to a prize; whereas this is not the case.

[1] *Āp Ke Masā'il Aur Oen Kā H̲ull*, vol. 6, p. 277.

We gauge the verdict of permissibility from a text of Hadrat Muftī Nizām ad-Dīn Sāhib rahimahullāh as well – that this additional amount is not preconditioned. Rather, it is nothing more than a donation:

Since there is no certainty in receiving the additional amount, the person cannot demand it, and everyone does not receive it. Rather, the post office merely announces the distribution of the extra amount according to whatever rules it has laid down, and as per the numbers [of the receipts] which are announced. One of the persons whose name appears receives the extra amount. The extra amount is a donation from the post office, and a donation is permissible. It will therefore be permissible to accept the additional amount. As for the Hadīth which refers to a loan which draws profits (كل قرض جرّ نفعا) – it refers to a profit which is preconditioned in the agreement. This is not the case here.[1]

(4)

Sometimes a prize is given as a cash amount. This is usury because the customer is receiving far more than what he had paid for the item. The extra amount has been received without having given something in exchange. This is why it is usury.

الربا فضل مال بلا عوض فى معاوضة مال بمال. (تبيين الحقائق: ٨٥/٤، ط: ملتان)

Answer:

It is impractical to include this as usury because usury refers to a preconditioned additional amount in a monetary compensation. In the question under discussion, no additional amount is preconditioned; it is probable. Neither does every person receive it nor can every person demand it. Furthermore, the transaction of the buyer entails an exchange of goods – he paid cash and received goods in exchange. There is no connection with the prize. The only thing is that the buyer's name has been included in the draw, and if his name is drawn, he receives a donation from the seller in the form of a prize. And the prize was probable; not certain.

Observe the following definitions of usury:

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[1] *Muntakhabāt Nizām al-Fatāwā*, vol. 1, pp. 194-195.

الربا هو الفضل المستحق لأحد المتعاقدين فى المعاوضة الخالي عن عوض شرط فيه. (الهداية: ٧٨/٣)

العناية:

الربا فى اللغة هو الزيادة... وفى الاصطلاح هو الفضل الخالى عن العوض المشروط فى البيع. (العناية: ٧\٣، ومثله فى الدر المختار: ٥/١٦٨، سعيد)

معجم لغة الفقهاء:

الربا كل زيادة مشروطة فى العقد خالية عن عوض مشروع. (معجم لغة الفقهاء، ص ٢١٨، وكذا فى التعريفات الفقهية، ص ١٠٢)

Hadrat Muftī Nizām ad-Dīn Sāhib rahimahullāh writes:

The essence of all the definitions of usury as given by the jurists is that in usurious items, there is an exchange transaction; and in the same transaction one party receives an extra amount without compensation. In other words, a profit is preconditioned in the transaction.[1]

This transaction may be objectionable if the prize is in the form of cash. If the prize is of a different genus, there can be no objection because according to Hanafī scholars, for usury to be realized, there has to be the same genus on both sides.

فالعلة عندنا الكيل مع الجنس أو الوزن مع الجنس. (الهداية: ٧٨/٣)

وفي معجم لغة الفقهاء: ربا الفضل بيع شيء من الأموال الربوية بجنسه متفاضلاً. (معجم لغة الفقهاء، ص: ٢١٨)

Allāh ta'ālā knows best.

[1] *Muntakhabāt Nizām al-Fatāwā*, vol. 1, p. 195.

LOANS AND DEBTS

When a debtor delays in repaying

Question

A person gave a loan to someone. The debtor is not paying back. The creditor is asking repeatedly but the debtor is resorting to delay tactics. What is the ruling in this regard?

Answer

If a person has no Sharʽī excuse and has the means to pay back what he owes, but still does not pay back even when asked; then he is committing a major act of oppression according to the Sharīʽah. It is harām to do this. He must pay back what he owes as quickly as possible.

Observe the following warning to the person who delays repayment despite having the means:

> عن أبي ہريرة رضي الله عنه أن رسول الله صلى الله عليہ وسلم قال: مطل الغني ظلم. متفق عليہ. (مشكوٰة شريف: ۲۵۱/۱، باب الافلاس والانظار، قديمى)
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> Rasūlullāh sallallāhu ʽalayhi wa sallam said: The delay of a wealthy person is an act of oppression.
>
> وعن الشريد رضي الله عنه قال: قال رسول الله صلى الله عليہ وسلم: لي الواجد يحل عرضہ وعقوبتہ، قال ابن المبارک: يحل عرضہ يغلظ لہ عقوبتہ يحبس لہ، رواه أبو داود والنسائى. (مشكوٰة شريف: ۲۵۳/۱، باب الافلاس والانظار، قديمى)
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> Rasūlullāh sallallāhu ʽalayhi wa sallam said: “When a wealthy person delays [in repaying his debt], his honour becomes lawful and it becomes permissible to punish him.” Hadrat ʽAbdullāh ibn Mubārak rahimahullāh said: “This means that he will be cursed verbally and he will be punished with imprisonment.”

عن أبي سعيد الخدري رضي الله عنه قال: صلى بنا رسول الله صلى الله عليه وسلم يوماً صلاة العصر بنا بنهار ثم قام خطيباً فلم يدع شيئاً يكون إلى قيام الساعة إلا أخبرنا به... وفيه ألا وخيرهم الحسن القضاء الحسن الطلب، ألا وشرهم سيئ القضاء وسيئ الطلب... الخ. (رواه الترمذى: ٤٣/٢، باب ما اخبر النبى صلى الله عليه وسلم اصحابه بما هو كائن الى يوم القيامة، فيصل)

> ...Rasūlullāh sallallāhu ʽalayhi wa sallam said: "The best of them is the one who pays back a loan in a good way, and the one who asks its repayment in a kind manner. The worst of them is the one who does not pay back a loan in the proper manner, and the one who demands its repayment in a cruel way."

Allāh taʽālā knows best.

Taking one kilo[1] wheat on loan

Question

If a person sells one kilo of wheat in exchange for one kilo of wheat which will be paid back to him after one month, then this is impermissible. However, if he gives one kilo of wheat on loan on the condition that it will be paid back after one month, then this is permissible and commonly practised. When we look at the principle الإعتبار للمعاني, the essence of both transactions is the same. The jurists say that kafālah with the condition of barā'ah ad-dayn is hawālah, and hawālah with the condition of iʽtāʽ al-madyūn is kafālah. They say that this is because the meaning is taken into consideration. If the meaning is taken into consideration, why is the wheat given on credit permissible?

[1] The original contains the word sāʽ which is equals about 3kgs. The kilo weight is used for easy understanding. (translator)

Answer

The law demands that this loan also be impermissible. However, because Rasūlullāh sallallāhu ʿalayhi wa sallam used to take loans and had passed away in a state where he had taken a loan from a Jew, we say it is permissible on account of the consent of the Hadīth. For example, salam is excluded from bayʿ al-maʿdūm. Also, there is a need for a loan. This is why it is permissible to give and take loans.

عن عائشة رضي الله تعالىٰ عنها قالت: توفي رسول الله صلى الله عليه وسلم ودرعه مرهونة عند يهودي بثلاثين صاعاً من شعير. (رواه البخارى: ٦٤١/٢، فيصل)

ʿĀ'ishah radiyallāhu ʿanhā said: Rasūlullāh sallallāhu ʿalayhi wa sallam passed away while his shield was mortgaged by a Jew for thirty sāʿ of barley.

عن أبي هريرة رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم: من أخذ أموال الناس يريد أداءها أدى الله عنه (أى يسر عليه أداء دينه) ومن أخذ يريد إتلافها أتلفه الله. (رواه البخارى: ٣٢١/١، باب من أخذ أموال الناس)

Rasūlullāh sallallāhu ʿalayhi wa sallam said: "Whoever takes a loan with the intention of paying it back, Allāh taʿālā makes it easy for him to pay it back. Whoever takes a loan with no intention of paying it back, Allāh taʿālā destroys him."

That is, He does not make things easy for him in the future. Instead, He causes him further constraint.

بدائع الصنائع:

القرض يسلك به مسلك العارية ...والدليل على أنه يسلك به مسلك العارية أن لا يخلو إما أن يسلك به مسلك المبادلة وهي تمليك الشيء بمثله أو يسلك به مسلك العارية لا سبيل إلى الأول لأنه تمليك العين بمثله نسيئة وهذا لا يجوز، فتعين أن يكون عارية فجعل التقدير كأن المستقرض انتفع

بالعين مدة ثم رد عين ما قبض وإن كان يرد بدله فى الحقيقة وجعل رد بدل العين بمنزلة رد العين. (بدائع الصنائع، فصل فى شرائط القرض، كتاب القرض: ٣٩٦/٧، سعيد)

الفتاوى الهندية:

وعن أبي يوسف في رواية يجوز استقراضه (الدقيق) وزناً استحساناً إذا تعارف الناس ذلک وعليه الفتوىٰ كذا فى الغياثية. (الفتاوى الهندية: ٢٠١/٣)

Jadīd Muʿāmalāt Ke Sharʿī A<u>h</u>kām:

Generally there is leniency in matters related to food and drink. The giving and taking of loans in this regard is not for the sake of earning a profit. Rather, it is merely to fulfil a temporary need. Minor additions and subtractions are not included as usury. Therefore, usury will not be established in such items.[1]

A<u>h</u>san al-Fatāwā:

Because it is an exchange of one genus for the same genus, one could erroneously assume it to be usury while it is not so in reality. Rather, it is a loan. It will be usury when there is an exchange of one genus for a different one, or when there is an exchange of one genus for the same genus, but the words bayʿ, mubādalah or muʿāwa<u>d</u>ah are used. If one genus is given and the same genus is returned, but the words bayʿ, mubādalah or muʿāwa<u>d</u>ah were not used; then this is a loan irrespective of whether the word loan was used or not. This is undoubtedly permissible.[2]

ʿI<u>t</u>r Hidāyah:

This type of loan was included in the classification of usury because it was a credit transaction of the same genus. However, because its purpose is essentially an act of kindness and a favour, then although an exchange takes place, the exchange is not the fundamental objective. The fundamental objective is to do a favour. The Sharīʿah not only permits it, rather it recommends it. Furthermore, the scholars concur on its permissibility…

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[1] *Jadīd Muʿāmalāt Ke Sharʿī A<u>h</u>kām*, vol. 1, p. 187.

[2] *A<u>h</u>san al-Fatāwā*, vol. 7, p. 173.

قوله وهو ربا وهذا يقتضى فساد القرض لكن ندب الشارع إليه وأجمع الأمة على جوازه. (حاشية الهداية: ٧٦/٣، رقم الحاشية ١٩)[1]

Further reading: *Muʿallim al-Fiqh* (Urdu translation of *Majmūʿah al-Fatāwā*), vol. 2, p. 176.

Allāh taʿālā knows best.

Borrowing rands and paying back in dollars

Question

A man gave a loan of R100 000 to another person with a loan period of one year. He then says to his debtor: "When you pay me back after one year, you must pay me fifteen thousand dollars." Is this permissible?

Answer

If the lender says to the borrower: "I am lending you R100 000 in exchange for fifteen thousand dollars which you must pay back after one year," and he hands over the R100 000 in the same assembly, then this agreement is permissible. There will be no usury or any other sin in it. This is because a currency is not a natural currency (thaman-e-khalqī) but a customary currency (thaman-e-ʿurfī). Furthermore, currencies of different countries are classified as different species. Therefore, taking possession in the same assembly is not necessary; it can be deferred. Yes, it is necessary to take possession of one currency so that it does not become bayʿ al-kālī bi al-kālī.

The following is stated in *Fiqhī Maqālāt*:

Businessmen and people in general are in the habit of giving the currency of one country to a person and saying to him: "You must pay me such and such currency after such and such time at such and such place." Imām Abū Hanīfah rahimahullāh is of the view that this is permissible because when a thaman is sold, it is not a precondition for the thaman to be in the possession of the one selling it. Thus, if the currencies are different, it will be permissible to sell them on credit.

وإذا اشترى الرجل فلوساً بدراهم ونقد الثمن ولم تكن الفلوس عند البائع فالبيع جائز لأن الفلوس الرائجة كالنقود، وقد بينا أن حكم العقد فى الثمن

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[1] *ʿItr Hidāyah*, p. 416.

وجوبها ووجودها معا ولا يشترط قيامها في ملك بائعها لصحة العقد كما لا يشترط ذلك فى الدراهم والدنانير. (المبسوط للامام السرخسى: ٢٤/١٤، باب البيع بالفلوس، ادارة القرآن)[1]

Jadīd Mu'āmalāt Ke Shar'ī Ahkām:

The currencies of different countries are classified as items of different categories. Their names, etc. are different. Since they are of different categories, it is permissible to sell the currency of one country for the currency of another country with differences in the amounts. It is also permissible to engage in such a business. However, it is essential for one of the two parties to take possession of either of the two currencies in the assembly of the transaction. If even one party does not take possession of it in the assembly, and each party promises to pay the other later on, this will not be permissible because it would entail separating from the assembly while each one having a debt against the other. And this is impermissible as per the teachings of the Hadīth.

قال العلامة برهان الدين المرغيناني: وإذا عدم الوصفان الجنس والمعنى المضموم إليه حل التفاضل والنساء لعدم العلة المحرمة والأصل فيه الإباحة وإذا وجد حرم التفاضل والنساء لوجود العلة وإذا وجد أحدهما وعدم الآخر حل التفاضل وحرم النساء. (الهداية: ٧٩/٣، باب الربا، دار الفكر).[2]

Jadīd Mu'āmalāt Ke Shar'ī Ahkām:

A precondition for a loan to be permissible is that it has to be mathalī (the same item has to be available). Those which are not mathalī cannot be given on loan. This is because when something is taken on loan, it is necessary to give the same thing back.

قال العلامة الصابوني: ونص الفقهاء على أن قرض المكيل والموزون جائز، كاستقراض الحب والشعير، والتمر والزبيب وكالاستقراض السمن والزيت، وكل ما يكال ويوزن، وأما ما لا مثل له فلا يجوز إقراضه كاللآلى، والجوهرات،

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[1] *Fiqhī Maqālāt*, vol. 1, p. 42.

[2] *Jadīd Mu'āmalāt Ke Shar'ī Ahkām*, vol. 1, p. 139.

وبهذا مذهب أبي حنيفة وأجاز الشافعية والحنابلة إقراض ما لا مثله له إذا كان معروف القيمة، فيجب رد القيمة. (فقه المعاملات)

The gist of the above is that if a weighed or measured item has something like it, it will be permissible to give it as a loan. Those which are not mathalī, and are known as dhawāt al-qiyam, cannot be given as loans. However, dirhams, dīnārs and other currencies can be given on loan. This is because each country's currency has the like thereof within that country.[1]

Allāh taʿālā knows best.

Collecting extra when the value is less

Question

I loaned one thousand rands to Zayd and it was agreed that he will pay it back to me within one year. When he is repaying the money to me after one year, the value of the one thousand rands has decreased. If I were to collect the one thousand rands at last year's value, it will be interest. And if I were to collect it at the present value, I will be suffering a loss. What can I do to save my self from loss and not commit the sin of usury at the same time?

Answer

You can only take back the one thousand rands which you loaned; you are not allowed to take more. Once you take more than what you loaned, it will be usury. When the loan period expires, the mathalī amount is returned. This is why it is not permissible to give qiyamī items on loan. A definitional thaman falls under the ruling of a mathalī item.

(القرض هو عقد مخصوص) أى بلفظ القرض ونحوه (يرد على دفع مال) بمنزلة الجنس (مثلى) خرج القيمى (لآخر ليرد مثله) (وصح القرض فى مثلى) هو كل ما يضمن بالمثل عند الاستهلاك (لا في غيره)، (قوله فى مثلى)كالمكيل والموزون والمعدود المتقارب كالجوز والبيض... واستقراض من الفلوس الرائجة والعدالى... وكذا كل ما يكال ويوزن لما مر أنه مضمون بمثله فلا عبرة لغلائه

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[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 183.

ورخصه. وفي كافى الحاكم، لو قال أقرضني دانق حنطة فأقرضه ربع حنطة، فعليه أن يرد مثله إلى أن قال وكذلك لو قال أقرضني عشرة دراہم غلة بدينار، فأعطاه عشرة دراہم فعليه مثلها، ولا ينظر إلى غلاء الدراہم ولا إلى رخصها، وفى الفتاوى الهندية: استقرض حنطة فأعطى مثلها بعد ما تغير سعرها يجبر المقرض على القبول. (الدر المختار مع فتاوى الشامى: ٥/١٦١، ١٦٢، باب القرض، سعيد)

Furthermore, this issue is similar to ghasab (illegal seizure or usurpation). If a usurper seizes an item, and its value drops, then when he returns the item, he will have to return the same item. The rise or fall in the value of that item is not considered.

فتاوى الشامى:

ولو وجده المغصوب في بلد الغصب ونقص السعر يأخذ العين لا القيمة يوم الغصب. (فتاوى الشامى: ٦/١٨٢، سعيد)

الهداية:

بخلاف تراجع السعر إذا رد فى مكان الغصب لأنه عبارة عن فتور الرغبات دون فوات الجزء. (الهداية: ٣/٣٧٥)

If you want to save yourself from loss, you should give gold, e.g. a Kruger coin, as a loan. When the term expires, you must collect a Kruger coin from the borrower. This is because gold generally increases in value; its value does not drop.

Allāh ta'ālā knows best.

Decreasing the loan when it is paid before-hand

Question

A person owes ten thousand rands to another as a deferred loan. The borrower says to the lender: "Pardon one thousand rands from it, and I will pay you nine thousand rands right now." Is this permissible?

Answer

If a condition of this nature was laid down, then this transaction is impermissible. If they agree to it without a precondition, then it will be an act of kindness. The lender reduced the amount and did a favour to the borrower. The borrower also did a favour to the lender by paying back before hand. Also, if a third person says by way of reconciliation: "If you drop off such and such amount, the borrower will pay you the amount immediately," then there is leeway for this as well.

Hadrat ʿAbdullāh ibn Abī Hadrad radiyallāhu ʿanhu owed some money to Hadrat Kaʿb ibn Mālik radiyallāhu ʿanhu. The two were having a discussion in the masjid. Rasūlullāh sallallāhu ʿalayhi wa sallam arrived and requested the lender to pardon half the amount, and asked the borrower to pay the amount immediately. The borrower paid it. Rasūlullāh sallallāhu ʿalayhi wa sallam did not ask whether the debt was deferred or immediate. This shows that if it is deferred, some of it can be pardoned if it is paid immediately, and this is done as a reconciliation or without a precondition.

وذكر في شرح الكافى للاسبيجابي جواز ہذا الصلح مطلقاً على قياس قول أبي يوسف لأنہ إحسان من المديون فى القضاء بالتعجيل وإحسان من جانب الدائن فى الاقتضاء بحط بعض حقہ وحسن، ہذا إذا لم يكن مشروطاً فى الآخر، وأما إذا شرط أحدہما في مقابلة الآخر فدخل فى الصلح معاوضة فاسدة فيكون فاسداً وہكذا فى غاية البيان. (تكملة رد المحتار: ٢/٢٥٣، سعيد)

If a condition was laid down, it will not be correct.

قال ولو كانت لہ ألف مؤجلة فصالحہ على خمسمائة حالة لم يجز لأن المعجل خير من المؤجل وہو غير مستحق بالعقد فيكون بإزاء ما حطہ عنہ وذلك اعتياض عن الأجل وہو حرام. (الهداية: ٣/٢٥١، باب الصلح عن الدين)

قال فى التنوير وشرحه: ولا يصح (الصلح) عن دراهم على دنانير مؤجلة أو عن ألف مؤجل على نصفه حالاً لأنه اعتياض عن الأجل وهو حرام. (الدر المختار مع رد المحتار: ٦٤٠/٥)

In short, there must be no precondition. Rather, it must be a promise. In other words, the lender says: "Allāh willing, if you pay quickly, I promise to give you half back." This is permissible. Similarly, instead of cash, a condition for goods may be laid down. For example, "If you pay back half the debt in the form of goods," there is no harm in laying down such a condition.

قال الجصاص فى احكام القرآن: ومن أجاز من السلف إذا قال عجل لي واضع عنك فجائز أن يكون أجازوه إذا لم يعجله شرطاً فيه وذلك بأن يضع عنه بغير شرط ويعجل الآخر الباقي بغير شرط. (احكام القرآن: ٤٦٧/١، باب الربا)

قال ابن الرشد فى بداية المجتهد: أما ضع وتعجل فأجازه ابن عباس رضي الله عنه من الصحابة وزفر من فقهاء الأمصار، ومنعه جماعة منهم ابن عمر رضي الله عنه من الصحابة ومالك وأبو حنيفة والثورى وجماعة من فقهاء الأمصار واختلف قول الشافعي في ذلك، فأجاز مالك وجمهور من ينكر "ضع وتعجل" أن يتعجل الرجل في دينه المؤجل عرضاً يأخذه وإن كانت قيمته أقل من دينه. (بداية المجتهد: ١٠٨/٢ باب فى بيوع الذرائع الربوية)

If the debt is immediate, there is leeway to decrease it.

ومن له على آخر ألف درهم حالة فقال: اد إلي غداً منها خمسمائة على أنك بريء من الفضل ففعل فهو بريء. (شرح العناية على هامش فتح القدير: ٤٢٧/٨، دار الفكر، وكذا فى البناية للعينى: الجزء الثالث، ص ٥١٦)

Allāh taʿālā knows best.

Repayment of a loan after twenty years

<u>Question</u>

Twenty years ago, a woman sold a vehicle for R45 000 (this was the market value at the time). The buyer did not pay the amount. He has repented now and wants to pay back the amount. However, R45 000 after twenty years is a small amount. Its buying power has dropped considerably. Can the seller ask for a higher amount?

<u>Answer</u>

If the buyer is paying back after twenty years, he will have to pay R45 000. The seller cannot ask for more. This is because a currency is a definitional thaman and not mathalī. Increase and decrease in value is not considered.

واستقراض من الفلوس الرائجة والعدالى... وكذا كل ما يكال ويوزن لما مر أنه مضمون بمثله فلا عبرة لغلائه ورخصه. وفي كافى الحاكم، لو قال أقرضني دانق حنطة فأقرضه ربع حنطة، فعليه أن يرد مثله إلى أن قال وكذلك لو قال أقرضني عشرة دراهم غلة بدينار، فأعطاه عشرة دراهم فعليه مثلها، ولا ينظر إلى غلاء الدراهم ولا إلى رخصها، وفى الفتاوى الهندية: استقرض حنطة فأعطى مثلها بعد ما تغير سعرها يجبر المقرض على القبول. (الدر المختار مع فتاوى الشامى: ١٦١/٥، ١٦٢، باب القرض، سعيد)

Furthermore, this issue is similar to ghasab (illegal seizure or usurpation). If a usurper seizes an item, and its value drops, then when he returns the item, he will have to return the same item. The rise or fall in the value of that item is not considered.

<u>فتاوى الشامى:</u>

ولو وجده المغصوب في بلد الغصب ونقص السعر يأخذ العين لا القيمة يوم الغصب. (فتاوى الشامى: ١٨٢/٦، سعيد)

الهداية:

بخلاف تراجع السعر إذا رد فى مكان الغصب لأنه عبارة عن فتور الرغبات دون فوات الجزء. (الهداية: ٣/٣٧٥)

Allāh ta'ālā knows best.

A person in debt giving optional charity

Question

Can a person who is in debt give optional charity? Will he be rewarded for his charity or will he be sinful?

Answer

An optional charity is optional while the repayment of a debt is obligatory. The obligatory has to be fulfilled first. Yes, if the debtor pays due importance to paying his debt and gives some optional charity as well, he will receive the reward for charity.

ومن تصدق وهو محتاج أو أهله محتاج أو عليه دين فالدين أحق أن يقضى من الصدقة والعتق والهبة... والمعنى أن شرط التصدق أن لا يكون محتاجاً ولا أهله محتاجاً ولا يكون عليه دين فإذا كان عليه دين فالواجب أن يقضى دينه، وقضاء الدين أحق من الصدقة والعتق والهبة لأن الابتداء بالفرائض قبل النوافل، وليس لأحد إتلاف نفسه وإتلاف أهله وإحياء غيره، وإنما عليه إحياء غيره بعد إحياء نفسه وأهله إذ هما أوجب عليه من حق سائر الناس. (عمدة القارى: ٤٠١/٦، باب لا صدقة الا عن ظهر غنى، ملتان)

وعن أبي هريرة رضي الله عنه عن النبي صلى الله عليه وسلم قال: من أخذ أموال الناس يريد أداءها أدى الله عنه، ومن أخذ يريد إتلافها أتلفه الله. (رواه البخارى: ٣٢١/١، باب من أخذ أموال الناس)

Fatāwā Mahmūdīyyah:

The donation is optional while the payment of his debt is obligatory. If a person performs optional salāh while he has obligatory salāhs to perform, he still receives the reward for the optional. As for his delay

in paying his debt, he will be accountable for it. It will not be correct to say that he will not receive a reward for the optional charity. Nonetheless, he must give due importance to repaying his debt.[1]

Allāh ta'ālā knows best.

Giving more when repaying a loan

Question

When repaying a loan, is it permissible for a person to give more than what he borrowed? Bear in mind that the additional amount was not preconditioned in the agreement. The debtor pays more incidentally at the time of repayment. What is the ruling?

Answer

Giving more at the time of repaying a debt is permissible only if it is done incidentally, the additional amount was not preconditioned in the agreement, it is not a practice in that society for the creditor to expect more, and no displeasure is expressed when an additional amount is not given. If these conditions are not fulfilled, it will not be permissible to give more.

عن أبي ہريرة رضي الله عنه قال: استقرض رسول الله صلى الله عليه وسلم مسناً فأعطى مسناً خيراً من مسنه وقال خياركم أحاسنكم قضاء. (رواه الترمذى: ٢٤٥/١، ورواه ابن ماجه فى باب السلم فى الحيوان)

وعلى ہامش الترمذي: وفى الحديث دليل على أن رد الأجود فى القرض من مكارم الأخلاق وليست من الأموال الربوية وأيضاً لم يكن مشروطاً في صلب العقد. (حاشية الترمذى، للمحدث احمد على السہارنپورى: ١٥٨/١)

وفي شرح مسلم للإمام النووي: وفيه أنه يستحب لمن عليه دين من قرض وغيره أن يرد أجود من الذي عليه وہذا من السنة ومكارم الأخلاق وليس ہو من قرض جر منفعة فإنه منہي عنه لأن المنہي عنه ما كان مشروطاً في عقد القرض. (الشرح الكامل: ٣٠/٢)

[1] *Fatāwā Mahmūdīyyah*, vol. 16, p. 424.

(وكذا فى تكملة فتح الملهم: ٦٤٤/١)

وفى الدر المختار: وكان عليه مثل ما قبض فإن قضاه أجود بلا شرط جاز. (الدر المختار: ١٦٥/٥، سعيد)

البحر الرائق:

ولا يجوز قرض جر نفعاً بأن أقرضه دراهم مكسورة بشرط رد صحيحه أو أقرضه طعاماً في مكان بشرط رده في مكان آخر فإن قضاه أجود بلا شرط جاز. (البحر الرائق: ١٢٢/٦، تتمة فى مسائل القرض، كوئتة)

الفتاوى الهندية:

وإذا رجح فى بدل القرض ولم يكن الرجحان مشروطاً فى القرض فلا بأس به كذا فى المحى،... قال محمد في كتاب الصرف أن أبا حنيفة كان يكره كل قرض جر منفعة، قال الكرخى: هذا إذا كانت المنفعة مشروطة فى العقد بأن أقرض غلة ليرد عليه صحاحاً أو ما أشبه ذلك فإن لم تكن المنفعة مشروطة فى العقد فأعطاه المستقرض أجود مما عليه فلا بأس به. (الفتاوى الهندية: ٢٠٣/٣)

Jadīd Mu'āmalāt Ke Shar'ī Ahkām:

It is harām to derive benefit from a loan, in the sense that the person who gives the loan lays down a condition or it is a practice in that society for the borrower to give more than the amount which he borrowed. If an additional amount is not preconditioned in the agreement and the debtor merely gives more out of his good will, it is not classified as usury in the Sharī'ah. In fact, it is better to do this.

لحديث جابر بن عبد الله رضي الله عنه قال: كان لي على رسول الله صلى الله عليه وسلم حق فأعطاني وزادني. (اخرجه الشيخان والامام احمد)[1]

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[1] *Jadīd Mu'āmalāt Ke Shar'ī Ahkām*, vol. 1, p. 183.

Further reading: *Badā'i' as-Sanā'i'*, vol. 7, p. 395; *Mirqāt al-Mafātīh*, vol. 6, p. 99; *I'lā' as-Sunan*, vol. 14, p. 521; *Imdād al-Ahkām*, vol. 3, p. 489; *Āp Ke Masā'il Aur Oen Kā Hull*, vol. 6, p. 161; *Fatāwā Mahmūdīyyah*, vol. 16, p. 413; *Kitāb al-Fatāwā*, vol. 5, p. 373.

Allāh ta'ālā knows best.

Bringing a debt forward when a debtor dies

Question

A debtor passed away while his debt was deferred. Will it be brought forward now that he has passed away? What I mean is that a person took a loan to buy goods in instalments. It was agreed that he will repay the loan in instalments over a period of one or two years. Now that he has passed away, will the debt have to be paid immediately or will it be paid in instalments over the agreed period?

Answer

According to Hanafī scholars, when a time-period is laid down for the repayment of a loan, the time-period does not become obligatory. This is because a loan is an act of kindness, and there is no compulsion in a donation. Therefore, the lender can ask for the repayment of his loan whenever he wants. Yes, a time-period is like a promise; and religious integrity demands that the promise be fulfilled. This is why a borrower should be given a respite. However, now that he has passed away, his wealth has been transferred to his heirs. And it is necessary to pay off all debts before the distribution of the estate. Based on this, the deferred debt will be brought forward and it will be necessary to pay it immediately. Yes, if everyone agrees on a deferred payment and repayment in instalments, there is no objection to doing this as stated by the author of *Muhīt* and Imām Qādī Khān.

عمدة القارى:

اختلف العلماء في تأخير الدين فى القرض إلى أجل فقال أبو حنيفة وأصحابه: سواء كان القرض إلى أجل أو غير أجل له أن يأخذه متى أحب وكذلك العارية وغيرها لأنه عندهم من باب العدة والهبة غير مقبوضة وهو قول الحارث العكلى وأصحابه وإبراهيم النخعى وقال ابن أبي شيبة: وبه نأخذ. (عمدة القارى: ١٢٥/٩ باب اذا اقرضه الى اجل مسمى، ط: ملتان)

احكام التركات والمواريث:

وثالثها أن فى التأجيل ضرراً بالوارث لأن فيه تأخيراً لاستخلاص حقه فى الميراث لا يتخلص إلا بعد أداء الدين لقوله تعالىٰ: من بعد وصية يوصى بها أو دين. (احكام التركات والمواريث، لمحمد ابو زهرة، ص ٤٠)

فتاوى الشامى:

قوله ودين الميت: أى لو مات المديون وحل المال فأجل الدائن وارثه لم يصح لأن الدين فى الذمة وفائدة التأجيل أن يتجر فيودى الدين من نماء المال فإذا مات من له الأجل تعين المتروك لقضاء الدين، فلا يفيد التأجيل كذا فى الخلاصة وظاهره أنه في كل دين وذكره فى القنية فى القرض، بحر، وفى الفتح مثل ما فى القنية لكن فى الذخيرة تأجيل رب الدين ماله على الميت لا يجوز والصحيح أنه قول الكل لأن الأجل صفة الدين ولا دين على الوارث فلا يثبت الأجل في حقه ولا وجه أيضاً لثبوته للميت لأنه سقط عن ذمته بالموت ولا لثبوته فى المال لأنه عين والأعيان لا تقبل التأجيل، وفى البرجندى قال صاحب المحيط: الأصح عندي أن تأجيله صحيح وهكذا أفتى الإمام قاضيخان. (فتاوى الشامى: ١٥٨/٥، سعيد، وكذا فى البحر الرائق: ١٢٢/٦، كوئتة)

وفي تنوير الأبصار: ولزم تأجيل كل دين إلا القرض فلا يلزم تأجيله. وفى الشامية: أى يصح تأجيله مع كونه غير لازم فللمقرض الرجوع عنه، لكن قال فى الهداية: فإن تأجيله لا يصح لأنه إعارة و صلة فى الابتداء حتى يصح بلفظة الإعارة و لا يملكه من لا يملك التبرع كالوصى والصبى ومعاوضة فى الانتهاء فعلى اعتبار الابتداء لا يلزم التأجيل فيه كما فى الإعارة إذ لا جبر فى التبرع. (فتاوى الشامى: ١٥٨/٥، سعيد)

السنن الكبرى:

عن علي رضي الله عنه قال:كان رسول الله صلى الله عليه وسلم إذا أتى بجنازة لم يسأل عن شيء من عمل الرجل إلا أن يسأل عن دينه ...إلى أن قال: إنه ليس من ميت يموت وعليه دين إلا وهو مرتهن بدينه. (رواه البيهقى: ٧٣/٦، باب وجوب الحق بالضمان)

احكام التركات:

فإن هذا الحديث يقتضى التعجيل بقضاء الدين فكاً لهذه النفس المرهونة بالقضاء وذلك يقتضى سقوط الأجل. (احكام التركات، ص ٣٩)

Allāh taʿālā knows best.

Resorting to stratagems to collect one's debt

Question

A person is owed some money but his debtor is refusing to pay. Can the creditor resort to other means and stratagems to collect his debt?

Answer

The original verdict of Hanafī scholars is that it is not permissible to resort to other means to collect one's debt. However, in our times, the verdict is that there is leeway to resort to other means.

(قوله أطلق الشافعي أخذ خلاف الجنس) أى من النقود أو العروض... قال القهستاني: وفيه إيماء إلى أن له أن يأخذ من خلاف جنسه عند المجانسة فى المالية وهذا أوسع فيجوز الأخذ به وإن لم يكن مذهبنا، فإن الإنسان يعذر فى العمل به عند الضرورة كما فى الزاهدي. قلت: وهذا ما قالوا: إنه لا مستند له، لكن رأيت في شرح نظم الكنز للمقدسي من كتاب الحجر، قال: ونقل جد والدي لأمه الجمال الأشقر في شرحه للقدوري أن عدم جواز الأخذ من خلاف الجنس كان في زمانهم لمطاوعتهم فى الحقوق، والفتوىٰ اليوم على جواز

الأخذ عند القدرة من أى مال كان لا سيما في ديارنا لمداومتهم للعقوق. (فتاوى الشامى: ٩٥/٤، كتاب السرقة، سعيد)

وفى الشامية: فلو من جنسه فله أخذ قدر حقه منه بلا كلام. (فتاوى الشامى: ٥٠١/٦، باب ما يجوز ارتهانه، سعيد)

Ahsan al-Fatāwā:

It is permissible but the person must ensure he never takes more than his right. There is no need to inform his debtor after he has retrieved his debt. This is especially if there is the fear of his displeasure.[1]

Allāh ta'ālā knows best.

Retrieving one's debt from an insurance company

Question

A person took a loan from someone and cannot repay it. He has passed away. He had taken out a life insurance. Can the lender collect his debt from the insurance company?

Answer

The person may collect his original capital amount which he leant, and give the extra interest amount in charity to the poor without the intention of reward. It is not permissible for him to use the additional amount. If the debt cannot be fully paid from the original capital amount and the deceased has not left behind any other wealth, he may take the interest amount through the hīlah of tamlīk.

Kitāb al-Fatāwā:

It is not permissible to take out insurance. From the money which the insurance company pays, only that amount is lawful which the person had paid to the insurance company. The additional amount is interest. It is obligatory to spend it on the poor without the intention of reward.[2]

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[1] *Ahsan al-Fatāwā*, vol. 7, p. 174 as quoted from *Radd al-Muhtār*, vol. 5, p. 300.

[2] *Kitāb al-Fatāwā*, vol. 5, p. 360.

والحاصل أنه إن علم أرباب الأموال، وجب رده عليهم، وإلا فإن علم عين الحرام لا يحل له، ويتصدق به بنية صاحبه. (رد المحتار: ٩٩/٥، مطلب فيمن ورث مالاً حراماً، سعيد)

Nizām al-Fatāwā:

After giving it in the ownership of a poor person, it may be used for the cleaning of masjid toilets. This is how the leeway will be applied: Give the interest money to poor people who are eligible and make them owners of it. The latter will then give it as a donation to the masjid.

وقدمنا أن الحيلة أن يتصدق على الفقير، ثم يأمره بفعل هذه الأشياء. الدر المختار مع رد المحتار: ٣٤٥/٢، كتاب الزكوٰة، باب المصرف، سعيد. (نظام الفتاوىٰ: ١٩٩/١)

Allāh taʿālā knows best.

Collecting unlawful wealth from a non-Muslim

<u>Question</u>

A non-Muslim owes money to a Muslim. It is known that the non-Muslim has interest money, usurped money or stolen money. Will it be permissible to accept such money as repayment of the debt?

<u>Answer</u>

We gauge from the texts of the jurists that a non-Muslim's ownership of <u>h</u>arām wealth is affirmed in his favour. Therefore, a Muslim may accept it as repayment of the debt.

<u>فتاوى الشامى:</u>

وجاز أخذ دين على كافر من ثمن خمر لصحة بيعه أى بيع الكافر الخمر لأنها مال متقوم في حقه فملك الثمن فيحل الأخذ منه. (فتاوى الشامى: ٣٨٥/٦)

الفتاوى الهندية:

ولو كان لمسلم على نصراني دين، فباع النصراني خمراً أخذ بثمنها وقضاه المسلم من دينه، جاز له أخذه، لأن بيعه له مباح، ولو كان الدين لمسلم على مسلم فباع المسلم خمراً وأخذ ثمنها وقضاه صاحب الدين، كره له أن يقبض ذلك من دينه، كذا فى السراج الوهاج. (الفتاوى الهندية: ٣٦٧/٥، كتاب الكراهية، باب فى القرض والدين)

تكملة البحر الرائق:

وكره لرب الدين أخذ ثمن خمر باعها مسلم لا كافر، يعني إذا كان لشخص مسلم دين على مسلم فباع الذي عليه الدين خمراً وأخذ ثمنها وقضى الدين لا يحل للمدين أن يأخذ ذلك بدينه وإن كان البائع كافراً جاز له أن يأخذ والفرق أن البيع فى الوجه الأول باطل فلم يملك البائع الثمن وهو باقٍ على ملك المشتري فلا يحل له أن يأخذ مال الغير بغير رضاه والبيع فى الوجه الثاني صحيح فملك البائع الثمن لأن الخمر مال متقوم في حق الكافر فجاز له الأخذ بخلاف المسلم. (تكملة البحر الرائق: ٢٠١/٨، كوئته)

وللاستزادة انظر: (فتاوى الشامى: ٣٨٥/٦، فصل فى البيع، سعيد. وتبيين الحقائق: ٤٦٨/٧، كتاب الكراهية)

Imdād al-Ahkām:

Although unbelievers are addressed in subsidiary matters related to transactions and punishments, the general address is insufficient to apply the rule of impermissibility and invalidity. Rather, adherence is also a precondition. Those who are classified as harbī do not adhere at all to Islamic injunctions – neither in compliance to their beliefs nor in opposition to them. Therefore, no matter how they earn their money – whether through usury, unlawful seizure, baseless and invalid transactions, whether in compliance with or in opposition to their

religion – it will be included in their ownership. A Muslim is permitted to accept their money as a wage.[1]

Allāh taʿālā knows best.

Further explanation of the above

The following needs to be understood. Assuming non-Muslims accumulate wealth through stealing and usurpation. Non-Muslim dhimmīs are classified as ma'mūnīn and muʿāhidīn (those who are guaranteed peace and with whom a covenant is made). If they consider an act as prohibited in their religion and they acquire wealth in that prohibited manner, then it will not be correct for a Muslim to accept that particular wealth [which was acquired in a prohibited manner]. Yes, if it is mixed with their other wealth and the major portion of it is lawful or obtained through the sale of alcohol, etc. – and not through stealing and usurping – then a Muslim may accept it as payment for his debt.

Imdād al-Ahkām:

When dhimmīs make an agreement in accordance with their religion and do not act against the conditions of the agreement, it will be classified as valid even though it may be against the Sharīʿah. However, an agreement which is against their religion and also against the conditions of the agreement, it will be classified as invalid.

ولعل الحق لا يتجاوز عن ذلک ولعل اللہ يحدث بعد ذلک أمرا-[2]

In an incident related to the peace treaty of Hudaybiyah, it is said that Hadrat Mughīrah ibn Shuʿbah radiyallāhu ʿanhu killed his polytheistic companions while journeying with them. He then took away their belongings, came to Madīnah and became a Muslim. Rasūlullāh sallallāhu ʿalayhi wa sallam said to him: "We accept your Islam but we have nothing to do with your wealth." Hāfiz Ibn Hajar rahimahullāh writes:

وأما المال فلست منہ في شيء أی لا أتعرض لہ لكونہ أخذ ہ غدراً ويستفاد منہ أنہ لا يحل أخذ أموال الكفار في حال الأمن غدراً لأن الرفقة يصطحبون على الأمانة والأمانة تؤدى الى أہلہا مسلماً كان أو كافراً وان أموال الكفار انما

[1] *Imdād al-Ahkām*, vol. 4, p. 390.

[2] *Imdād al-Ahkam*, vol. 4, p. 390.

تحل بالمحاربة والمغالبة ولعل النبي صلى الله عليہ وسلم ترک المال في يده لامكان أن يسلم قومہ فيرد اليهم أموالهم. (فتح البارى: ٣٤١/٥، باب الشروط فى الجهاد)

<u>عمدة القارى:</u>

قال أى المغيرة لأبي بكر رضي الله عنه: قتلتهم وجئت بأسلابهم الى رسول الله صلى الله عليہ وسلم ليخمس أو ليرى فيها رأيہ فقال رسول الله صلى الله عليہ وسلم: أما المال فلست منہ في شيء يريد في حل لأنہ علم أن أصلہ غصب وأموال المشركين وان كانت مغنومة عند القهر فلا يحل أخذها عند الأمن فاذا كان الانسان مصاحباً لهم فقد أمن كل واحد منهم صاحبہ. (عمدة القارى: ٦٤١/٩، باب الشروط فى الجهاد والمصالحة مع اہل الحرب)

Those who are classified as <u>h</u>arbī do not adhere at all to Islamic injunctions – neither in compliance to their beliefs nor in opposition to them. Therefore, no matter how they earn their money – whether through usury, unlawful seizure, baseless and invalid transactions, whether in compliance with or opposition to their religion – it will be included in their ownership. A Muslim is permitted to accept their money as a wage.[1]

In present times, the non-Muslims of most countries are classified as dhimmīs and muʿāhidīn. Therefore, only that wealth which they acquire in line with their beliefs is included in their ownership.

<u>فتاوى الشامى:</u>

وجاز أخذ دين على كافر من ثمن خمر لصحة بيعہ أى بيع الكافر الخمر لأنها مال متقوم في حقہ فملک الثمن فيحل الأخذ منہ. (فتاوى الشامى: ٣٨٥/٦)

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[1] *Imdād al-A<u>h</u>kām*, vol. 4, p. 390.

الفتاوى الهندية:

ولو كان لمسلم على نصراني دين، فباع النصراني خمراً أخذ بثمنها وقضاه المسلم من دينه، جاز له أخذه، لأن بيعه له مباح. (الفتاوى الهندية: ٣٦٧/٥، كتاب الكراهية، باب فى القرض والدين)

تكملة البحر الرائق:

وكره لرب الدين أخذ ثمن خمر باعها مسلم لا كافر، يعني إذا كان لشخص مسلم دين على مسلم فباع الذي عليه الدين خمراً وأخذ ثمنها وقضى الدين لا يحل للمدين أن يأخذ ذلك بدينه وإن كان البائع كافراً جاز له أن يأخذ والفرق أن البيع فى الوجه الأول باطل فلم يملك البائع الثمن وهو باقٍ على ملك المشتري فلا يحل له أن يأخذ مال الغير بغير رضاه والبيع فى الوجه الثاني صحيح فملك البائع الثمن لأن الخمر مال متقوم في حق الكافر فجاز له الأخذ بخلاف المسلم. (تكملة البحر الرائق: ٢٠١/٨، كوئته)

Hadrat Maulānā Ashraf ʿAlī Thānwī rahimahullāh writes in *Imdād al-Fatāwā* with reference to the earnings of a woman who embraces Islam and what she earned through adultery while she was a non-Muslim: Her income is not wholesome because adultery is not lawful in any religion.[1]

وللاستزادة انظر: (فتاوى الشامى: ٣٨٥/٦، فصل فى البيع، سعيد. وتبيين الحقائق: ٤٦٨/٧، كتاب الكراهية)

Ownership is also affirmed with respect to wealth which is mixed and the major portion is halāl. Therefore, it is permissible to accept such wealth when a non-Muslim repays his debt. Yes, if it is known that he has stolen or usurped wealth, and it is identified as such, then one should not accept it.

[1] *Imdād al-Fatāwā*, vol. 4, p. 144.

الدر المختار مع رد المحتار:

لو خلط السلطان المال المغصوب بماله ملكه، لأن الخلط استهلاک إذا لم يمكن تميزه عند أبي حنيفة، وقوله أرفق، إذ قلما يخلو مال عن غصب. وفی الشامية: قوله لأن الخلط استهلاک، أی بمنزلة من حيث أن حق الغير يتعلق بالذمة، لا بالأعيان،...لأنا نقول: إنه لما خلطها ملكها، وصار مثلها ديناً في ذمته، لا عينها. (الدر المختار مع رد المحتار: ٢٩٠/٢، مطلب فيما لو صادر السلطان جائزاً، سعيد)

الفتاوی البزازية:

ما يأخذه الأعونة من الأموال ظلماً ويخلطه بماله وبمال مظلوم آخر يصير ملكاً له وينقطع حق الأول فلا يكون أخذه عندنا حراماً محضاً نعم لا يباح الانتفاع به قبل أداء البدل فی الصحيح من المذهب. (الفتاوی البزازية علی هامش الهندية، قبيل كتاب الزكاة، ٨٣/٤)

الفتاوی التاتارخانية:

اشتری بدراهم مغصوبة، أو بدراهم اكتسبها من الحرام شيئاً، فهذا علی وجوه: (١) إما أن دفع إلی البائع تلک الدراهم أو لا، ثم اشتری منه بتلک الدراهم، (٢) إذا اشتری قبل الدفع بتلک الدراهم، ودفعها، (٣) أو اشتری قبل الدفع بتلک الدراهم، ودفع غير تلک الدراهم، (٤) أو اشتری مطلقاً، ودفع تلک الدراهم، (٥) أو اشتری بدراهم آخر، ودفع تلک الدراهم، ففی الوجوه كلها لا يطيب له التناول قبل ضمان يعني قبل ضمان الدراهم، وبعد الضمان يطيب له الربح، هكذا ذكره فی الجامع الصغير قال أبو الحسن الكرخی: هذا الجواب صحيح فی الوجه الأول والثاني، أما فی الوجه الثالث والرابع والخامس يطيب له، واليوم قالوا: الفتویٰ

على قول أبى الحسن الكرخي، لكثرة الحرام دفعاً للحرج على الناس، وعلى ہذا تقرر رأى الصدر الشهيد. (الفتاوى التاتارخانية: ٥١٠/١٦، ط: ديوبند)

وللمزيد راجع: (الدر المختار مع رد المحتار: ٢٣٥/٥، سعيد، والدر المختار: ١٨٩/٦، سعيد، وحاشية الطحطاوى على الدر المختار: ١٠٥/٤، كوئتہ)

When wealth is mixed [lawful and unlawful], the major portion is considered when the harām wealth is not known and identified. Observe the following juridical texts:

الفتاوى الہندية:

الباب الثاني عشر فى الہدايا والضيافات: أہدى إلى رجل شيئاً أو أضافہ إن كان غالب مالہ من الحلال فلا بأس إلا أن يعلم بأنہ حرام فإن كان الغالب ہو الحرام ينبغي أن لا يقبل الہدية ولا يأكل الطعام إلا أن يخبره بأنہ حلال... لأن أموال الناس لا تخلو عن قليل حرام فالمعتبر الغالب. (الفتاوى الہندية: ٣٤٢/٥)

المحيط البرہانى:

وفي عيون المسائل: رجل أہدى إلى إنسان أو أضافہ إن كان غالب مالہ من حرام لا ينبغي أن يقبل ويأكل من طعامہ ما لم يخبر أن ذلک المال حلال استقرضہ أو ورثہ، وإن كان غالب مالہ من حلال فلا بأس بأن يقبل ما لم يتبين لہ أن ذلک من الحرام؛ وہذا لأن أموال الناس لا تخلو عن قليل حرام و تخلو عن كثيره، فيعتبر الغالب ويبنى الحكم عليہ. (المحيط البرہانى: ١١٠/٦، الفصل السابع عشر فى الہدايا والضيافات) (وكذا فى الموسوعة الفقهية الكويتية: ٧٨/١٥، والاشباه والنظائر: ٣٤٣/١، والمبسوط: ١٩٧/١٠)

Jawāhir al-Fatāwā:

If a person's income is both halāl and harām, we will have to check the following:

His halāl and harām wealth is separated completely. He uses his halāl wealth for his personal expenses such as food, drink and clothing, and we trust his word; then it will be permissible to eat at his house. If he gives a gift and says that it is from his halāl wealth, it will be permissible to accept it. If his wealth is mixed, the major portion will be considered.[1]

Allāh taʽālā knows best.

Taking an interest-loan to pay education fees

Question

A wealthy person takes an interest-loan to pay for his son's university fees. Is this permissible?

Answer

If taking a loan from amwāl-e-rabawīyyah means that he takes a loan from a bank and will pay interest on it, then this is not permissible. A university education is neither obligatory nor is it such a compelling reason for committing unlawful actions. If by your question, you mean that someone has interest money, and a father takes that interest money as a loan for his son – although both father and son are classified as wealthy – then the interest money is wājib at-tasadduq immediately. It is not correct to give it out as a loan. Yes, if the son is classified as poor, is not sāhib-e-nisāb, and he receives interest money by given ownership over it; then it will be valid. He may then use it as and where he wants.

Allāh taʽālā knows best.

Collecting a debt from harām wealth of a Muslim

Question

ʽAmr owes some money to Zayd. Zayd knows with certainty that ʽAmr is going to repay the loan from interest money. Is it permissible for Zayd to collect his debt from the interest money?

Answer

A Muslim cannot become an owner of interest money. Interest money has to be given in charity immediately. Therefore, it is also impermissible to use it to repay a loan to a Muslim. It is also

[1] *Jawāhir al-Fatāwā*, vol. 3, p. 296

impermissible for a lender to collect the amount which he loaned from interest money.

رد المحتار:

وما نقل عن بعض الحنفية من أن الحرام لا يتعدى ذمتين، سألت عنه الشهاب بن الشبلي، فقال: هو محمول على ما إذا لم يعلم بذلك أما لو رأى المكاس مثلاً يأخذ من أحد شيئاً من المكس ثم يعطيه آخر ثم يأخذ من ذلك الآخر آخر فهو حرام. (رد المحتار: ٩٨/٥، سعيد)

الدر المختار:

وجاز أخذ دين على كافر من ثمن خمر لصحة بيعه بخلاف دين على المسلم لبطلانه... وعلى هذا لو مات مسلم وترك ثمن خمر باعه مسلم لا يحل لورثته كما بسطه الزيلعي وفى الأشباه الحرمة تنتقل. (الدر المختار: ٣٨٥/٦، سعيد)

الفتاوى الهندية:

ولو كان الدين لمسلم على مسلم فباع المسلم خمراً وأخذ ثمنها وقضاه صاحب الدين، كره له أن يقبض ذلك من دينه، كذا فى السراج الوهاج. (الفتاوى الهندية: ٣٦٧/٥، كتاب الكراهية، باب فى القرض والدين)

تكملة البحر الرائق:

وكره لرب الدين أخذ ثمن خمر باعها مسلم لا كافر، يعني إذا كان لشخص مسلم دين على مسلم فباع الذي عليه الدين خمراً وأخذ ثمنها وقضى الدين لا يحل للمدين أن يأخذ ذلك بدينه. (تكملة البحر الرائق: ٢٠١/٨، كوئته)

احسن الفتاوىٰ:

والحاصل أن القرض لا يتأدى بكسب الزانية والمغنية والربا لأن الإجارة عليهما باطلة فلم تملك الزانية والمغنية ما أعطيتا من الأجرة فهو مال الغير

لا يتأدى بہ القرض والحرام لا يحل بتبدل اليد وكذا الربا، ہذا ما عندي، والله تعالىٰ أعلم-(احسن الفتاویٰ: ۱۹۲/۷، رسالہ اداء القرض من الحرام)

Allāh ta'ālā knows best.

Taking the wealth of a minor as a loan

<u>Question</u>

A person wants to take the wealth of his minor son as a loan. Is this permissible?

<u>Answer</u>

A person may take the wealth of his minor child as a loan for himself; he cannot give it on loan to anyone.

<u>الفتاوى الهندية:</u>

الوصي إذا أراد أن يقرض مال اليتيم من غيره فليس لہ ذلک باتفاق الروايات كذا فى المحيط، فإن أقرض كان ضامناً والقاضى يملک الإقراض واختلف المشايخ فى الأب لاختلاف الروايات عن أبي حنيفة والصحيح أن الأب بمنزلة الوصي لا بمنزلة القاضي ولو قضى الوصي دين نفسہ بمال اليتيم لا يجوز ولو فعل الأب ذلک جاز. (الفتاوى الهندية: ۱٤۷/٦، الباب التاسع فى الوصى وما يملکہ)

<u>فتاوى الشامى:</u>

تتمة: لو آجره الأب أو الجد أو الوصي صح، إذ لهم استعمالہ بلا عوض للتهذيب والرياضة فبالعوض أولىٰ، والوصي لو استأجره لنفسہ صح لا لو آجر نفسہ لليتيم، ولو آجر الأب نفسہ لہ صح ولہ قضاء دينہ من مال ولده بخلاف الوصي... ولا بأس للأب أن يأكل من مالہ بقدر حاجتہ لو محتاجاً ولا يضمن. (فتاوى الشامى: ۷۱۲/٦، سعيد)

مجمع الضمانات:

ولو قضى الوصي ديون نفسه بمال اليتيم لا يجوز، ولو فعل الأب ذلك جاز لأن الوصي لا يملك أن يشتري مال اليتيم لنفسه بمثل القيمة والأب يملك. (مجمع الضمانات:٢/ ٨٢٨، الباب الخامس والثلاثون فى الوصى والولى والقاضى)

جامع احكام الصغار:

وذكر رحمه الله تعالىٰ أيضاً في قضاء الجامع الصغير أن الأب لو أخذ مال ولده الصغير قرضاً جاز. (جامع احكام الصغار: ١/١٩٧)

Allāh ta'ālā knows best.

Expenses which are borne during a loan process

Question

Expenses such as paper-work are borne during a loan process. Who is responsible to pay for these expenses; the lender or the borrower?

Answer

The fundamental issue is one of need. The one who is in need will be responsible. In this case, the need of the borrower is obvious. However, the lender is also, to a certain extent, in need. That is, his loan must be repaid to him. The borrower is more in need, so he will be responsible for the expenses which are related to the loan.

الهداية:

وأجرة الكيال وناقد الثمن على البائع أما الكيل فلا بد منه للتسليم و هو على البائع و معنى هذا إذا بيع مكايلة، وكذا أجرة الوزان والزراع والعداد، وأما النقد فالمذكور رواية ابن رستم عن محمد لأن النقد يكون بعد التسليم، ألا ترى أنه يكون بعد الوزن والبائع هو المحتاج إليه ليميز ما تعلق به حقه من غيره أو ليعرف المعيب ليرده، وفي رواية ابن سماعة عنه على المشترى لأنه يحتاج إلى تسليم الجيد المقدر، والجودة تعرف بالنقد كما يعرف القدر بالوزن

فيكون عليه وأجرة وزان الثمن على المشتري لما بينا أنه هو المحتاج إلى تسليم الثمن وبالوزن يتحقق التسليم. (الهداية: ٢٩/٣)

(وكذا فى الفتاوى الهندية: ٢٨/٣، الفصل السادس فيما يلزم المتعاقدين من المؤنة فى تسليم المبيع والثمن)

المحيط البرهانى:

ثم أجرة الوزان على المديون، فكذا أجرة الناقد، فأما إذا قبض رب الدين فقد دخل في ضمانه فإذا ادعى أنه على خلاف حقه كان النقد محتاجاً إليه ليتمكن من الرد وذلك يقع لرب الدين فيكون الأجر عليه. (المحيط البرهانى، الفصل الثالث فى قبض المبيع بإذن البائع، ٢٧١/٦)

البحر الرائق:

وأما أجرة نقد الدين فإنه على المديون إلا إذا قبض رب الدين الدين ثم ادعى عدم النقد فالأجرة على رب الدين لأنه بالقبض دخل في ضمانه فالناقد إنما يميز ملكه ليستوفى بذلك حقاً له فالأجرة عليه. (البحر الرائق: ٣٠٦/٥، كتاب البيوع. وكذا فى مجمع الانهر شرح ملتقى الابحر: ٣١/٣، دار الكتب العلمية، بيروت)

وأجرة رد العارية على المستعير لأن الرد واجب عليه لما أنه قبضه لمنفعة نفسه والأجرة مونة الرد فتكون عليه. (الهداية: ٢٨٢/٣)

Allāh ta'ālā knows best.

Taking an interest-loan to save one's self from income tax

Question

Can a person take an interest-loan to save himself from income tax? If a person has more debts, the government charges him less tax.

Answer

It is best to abstain from every type of usurious transaction. However, if the income tax is oppressively high, then at the time of need and for the repulsing of harm, their ought to be leeway for taking an interest-loan. The jurists permit the payment of bribery for the sake of repulsing a harm.

Jadīd Fiqhī Mabāhith:

Paying bribes and interest to save one's self from income tax and for the purchase of expensive items.

This is undoubtedly permissible because there is benefit for Muslims and a repulsing of harm. There ought to be leeway given by even those who say that this is impermissible. After all, it is permissible for us to progress through trade and business, to buy goods, etc. We have the right to do this. When we proceed to acquire our rights, taxes and other related matters come as obstacles. Although this is not a state of compulsion, it is certainly oppression. And this is a clear harm to us. It ought to be permissible for us to adopt these means to protect ourselves against oppression and harm.[1]

A juridical principle is quoted by way of substantiation:

"الضرر يزال" أصلها قوله صلى الله عليه وسلم: "لا ضرر ولا ضرار"... ويبتنى على هذه القاعدة كثير من أبواب الفقه، فمن ذلك الرد بالعيب وجميع أنواع الخيارات و الحجر بسائر أنواعه على المفتى به... الخ. (الاشباه والنظائر: ٢٥٠/١، القاعدة الخامسة)

Allāh taʿālā knows best.

Paying the deceased's debt from a pension fund

Question

Is it permissible to pay the debts of a deceased person from money received from a pension fund?

Answer

It is permissible to use money received from a pension fund and to pay the debts of a deceased person.

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[1] *Jadīd Fiqhī Mabāhith*, vol. 2, p. 499.

Kifāyatul Muftī:

The pension which an employee receives on retirement is permissible.[1]

Allāh ta'ālā knows best.

Interest on a delayed repayment of a loan

Question

A person took a loan from a company on the condition that if he does not pay it back within three months, he will be charged interest. The person has the intention of paying it back within three months. What is the ruling with regard to taking a loan of this nature? Will he be sinning?

Answer

If the borrower has a firm intention to pay it back within three months, he will be permitted. Nonetheless, it is better to stay away from agreements of this nature.

By the company laying down the condition that it will charge a certain additional percentage if the loan is not repaid within three months makes this a usurious transaction. A loan is not invalidated by an invalid condition.

وما لا يبطل بالشرط الفاسد القرض... بأن قال أقرضتك هذه المائة بشرط أن تخدمني شهراً مثلاً فإنه لا يبطل بهذا الشرط، وذلك لأن الشروط الفاسدة من باب الربا وأنه يختص بالمبادلة المالية، وهذه العقود كلها ليست بمعاوضة مالية فلا تؤثر فيها الشروط الفاسدة، ذكره العيني... وفى البزازية: وتعليق القرض حرام والشرط لا يلزم- (البحر الرائق: ٦/١٨٧، باب المتفرقات من كتاب البيوع، كوئته)

وكذا فى تبيين الحقائق: ٤/١٣٣. والفتاوى البزازية على هامش الفتاوى الهندية: ٤/٤٢٦)

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[1] *Kifāyatul Muftī*, vol. 8, p. 94.

The person must try his utmost to pay it back within three months. If he does not, he will be committing the major sin of paying interest.

Fatāwā ʿUthmānī:

It is essential for the person to do his utmost to pay within the specified period so that he is not charged interest.[1]

Taking loans for enjoyment purposes

<u>Question</u>

Can a person take a loan merely to raise his living standard and for the sake of enjoyment?

<u>Answer</u>

The permission to take a loan is on the level of compulsion and necessity. A person has to abstain from taking a loan merely for luxurious living.

Islāmī Fiqh:

The Sharīʿah permits the taking of a loan for severe economic needs or for the protection of one's honour and dignity. If a person takes a loan for extravagant living, elevating his status and raising his artificial living standard; or he takes a loan out of necessity but becomes unmindful of its repayment; or delays in repaying despite having the means – then he will be a criminal morally and legally. In other words, he will be taken to task in the Hereafter, and ought to be punished in this world as well.[2]

Allāh taʿālā knows best.

Buying wheat on credit and paying for it in rands

<u>Question</u>

A person took ten kilos of wheat on credit. The debtor says to his creditor: "Instead of the ten kilos of wheat, I will pay you ten rands after five days." Is this agreement correct?

<u>Answer</u>

Since wheat is being exchanged for ten rands, the money will have to be paid immediately. If not, it will entail separating from a debt

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[1] *Fatāwā ʿUthmānī*, vol. 3, p. 353.

[2] *Islāmī Fiqh*, vol. 2, p. 429.

without payment (iftirāq ʽan ad-dayn bi lā ʽiwaḏ). And this is impermissible.

قولہ بدارہم مقبوضة الخ، فی البزازیة من آخر الصرف: إذا کان لہ علی آخر طعام أو فلوس فاشتراہ من علیہ بدراہم وتفرقا قبل قبض الدراہم بطل وہذا مما یحفظ فإن مستقرض الحنطة أو الشعیر یتلفہا ثم یطالبہ المالک بہا ویعجز عن الأداء فیبیعہا مقرضہا منہ بأحد النقدین إلی أجل، وأنہ فاسد لأنہ افتراق عن دین بدین. (فتاوی الشامی: ۵/۱۶۵، فصل فی القرض، سعید)

Bahishtī Zewar:

You took two kilos of barley or flour on credit. When the person asked for it, you replied: "I do not have the barley now. You may take two ānahs (money) instead." The person agreed. The money will have to be given there and then. If they separate from each other, the agreement will be invalid.[1]

Allāh taʽālā knows best.

Making gold the basis of a loan

Question

A person gave R15 000 as a loan to a person and said to him: "The current value of this [R15 000] is one ounce of gold. When you repay me, you must repay me one ounce of gold." After two years, R15 000 can buy only half an ounce of gold. Does the person have to pay back one ounce of gold or only the R15 000? If he refuses to pay it back in gold, can he be compelled?

Answer

For a loan to be permissible, the jurists lay down the condition of mathalī. This means that when repaying the loan, the same genus has to be repaid. If the lender lays down the condition that a different genus must be paid back, then it is a loan in appearance but not in reality. Instead, it is an exchange. And the ruling in this regard is that currency notes are not classified as thaman-e-khalqī (natural currency) but thaman-e-ʽurfī (customary currency). Therefore, when trading in them, the rules of bayʽ s̱arf will not apply. Based on this, the person's precondition of repaying the loan with one ounce of gold is

[1] *Bahishtī Zewar*, vol. 5, p. 31.

correct and this type of credit transaction is permissible. Yes, it is essential to take possession of either one of the "currencies" in the assembly of the transaction so that it does not entail bayʿ al-kālī bi al-kālī.

وفي رد المحتار: سئل الحانوتي عن بيع الذهب بالفلوس نسيئة فأجاب بأنه يجوز إذا قبض أحد البدلين. (فتاوى الشامى: ١٨٠/٥، باب الربا، سعيد)

وفى المبسوط للإمام السرخسي: إذا اشترى الرجل فلوساً بدراهم ونقد الثمن ولم تكن الفلوس عند البائع فالبيع جائز لأن الفلوس الرائجة ثمن كالنقود... وبيع الفلوس بالدراهم ليس بصرف. (المبسوط: ٢٤/١٤)

وللاستزادة انظر: (المحيط البرهانى: ٢٦٨/٧. والفتاوى الهندية: ٢٢٤/٣)

Fatāwā ʿUthmānī:

أما الذهب سواء كان تبراً أو مصوغاً فقد أجمع الأئمة الأربعة على أنه لا يعامل معاملة البضائع، وإنما يعمل أحكام النقود في جميع الأمور، لكن "الأوراق النقدية" قد وقع فيه خلاف بين العلماء المعاصرين، وإن كثيراً من علماء البلاد العربية جعلوها في حكم الذهب سواء بسواء، ولكن خالفتُهم في رسالتي "أحكام الأوراق النقدية" وذكرت أنها ليست قائمة مقام الذهب في جميع الأمور، فلا تجري فيها أحكام الصرف، ولذلك يجوز عندي أن يشترى الذهب أو الفضة بالنقود، ويجوز أيضاً أن يشترى الذهب نسيئة بالأوراق النقدية ولكن يجب أن يكون تقابض أحد البدلين فى المجلس إذا كان ذهباً خالصاً، وأن يعرف الأجل عند العقد وقد قبل هذا الموقف معظم علماء الهند وكثير من باكستان، والتفصيل في رسالتي "أحكام الأوراق النقدية". (فتاوىٰ عثمانى: ١٥٩/٣، كتاب البيوع)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

Take the following example of selling gold/silver on credit: A person bought gold jewellery and paid part of the money now and promised to pay the balance later on; or bought the entire amount of jewellery

on credit. The Sharīʿah ruling in this regard is that since the sale and purchase of gold/silver through currency notes does not fall under the injunctions of bayʿ as-sarf, it is permissible to buy and sell on credit provided possession is taken of either of the one in the assembly of the transaction. This is so that it does not fall under the ruling of bayʿ al-kālī bi al-kālī.

وفى الهندية: قال: وروى الحسن عن أبي حنيفة إذا اشترى فلوساً بدراهم وليس عند ہذا فلوس ولا عند الآخر دراہم ثم أن أحدہما دفع وتفرقا جاز وإن لم ينقد واحد منها حتى تفرقا لم يجز كذا فى المحيط. (الفتاوى الهندية: ٣/٢٢٤، الفصل الثالث فى بيع الفلوس)-[1]

Ahsan al-Fatāwā:

Currency notes are not like gold and silver coins. Neither are they receipts for gold and silver. This is why it is permissible to buy gold and silver with them under all conditions – with differences in amounts and also on credit.[2]

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

A precondition for a loan to be permissible is that it has to be mathalī (the same item has to be available). Those which are not mathalī cannot be given on loan. This is because when something is taken on loan, it is necessary to give the same thing back.

قال العلامة الصابوني: ونص الفقهاء على أن قرض المكيل والموزون جائز، كاستقراض الحب والشعير، والتمر والزبيب وكالاستقراض السمن والزيت، وكل ما يكال ويوزن، وأما ما لا مثل له فلا يجوز إقراضه كاللآلى، والجوہرات، وہذا مذہب أبي حنيفة وأجاز الشافعية والحنابلة إقراض ما لا مثله له إذا كان معروف القيمة، فيجب رد القيمة. (فقه المعاملات)

The gist of the above is that if a weighed or measured item has something like it, it will be permissible to give it as a loan. Those which are not mathalī, and are known as dhawāt al-qiyam, cannot be given as

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[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 128.

[2] *Ahsan al-Fatāwā*, vol. 6, p. 518; *Fatāwā Haqqānīyyah*, vol. 6, p. 124.

loans. However, dirhams, dīnārs and other currencies can be given on loan. This is because each country's currency has the like thereof within that country.[1]

Allāh taʿālā knows best.

Making the strength/weakness of a currency the basis for repaying a loan

Question

Khālid gave R10 000 to Bakr as a loan and laid down the condition that when he pays him back after two years, he will have to pay an additional amount which was caused by the drop in the value of the currency. For example, after two years, the buying power of R10 000 dropped and it would now cost R12 000 to buy the same item. Bakr will therefore have to pay back R12 000.

Answer

In our present age, a currency falls under the ruling of an independent definitional currency (thaman iṣṭilāḥī); it is not subject to the price of gold and silver. Since it is classified as an independent currency, then as long as it is in vogue, its increase or drop in value is not considered. Yes, it is another matter if a currency is completely cancelled. Therefore, in the above case, Khālid can only collect R10 000 from Bakr after the passage of two years. He has no right to ask for more, or else it will be like usury which is impermissible.

فتاویٰ قاضیخان:

رجل اشترى بالفلوس الرائجة والعدالي في زماننا شيئاً وكسدت الفلوس قبل القبض ...إلى أن قال: وإن غلا أو رخص لا يفسد العقد ولا خيار لأحدهما في ظاهر الرواية. (فتاویٰ قاضیخان على هامش الهندية: ٢/٢٥٣، باب الصرف)

بدائع الصنائع:

ولو لم تكسد ولكنها رخصت قيمتها أو غلت لا ينفسخ البيع بالإجماع وعلى المشتري أن ينقد مثلها عدداً ولا يلتفت إلى القيمة ههنا لأن الرخص أو الغلاء لا يوجب بطلان الثمنية ألا ترى أن الدراهم قد ترخص وقد تغلو وهي على

[1] *Jadīd Muʿāmalāt Ke Sharʿī Aḥkām*, vol. 1, p. 183.

حالها أثمان... استقرض شيئاً من ذوات الأمثال وقبضه ثم انقطع عن أيدى الناس... ولو لم تكسد ولكنها رخصت أو غلت فعليه رد مثل ما قبض بلا خلاف لما ذكرنا أن صفة الثمنية باقية. (بدائع الصنائع فى ترتيب الشرائع: ٢٤٢/٥، فصل فى حكم البيع، سعيد)

فتح القدير:

فلو لم تكسد ولم تنقطع ولكن نقصت قيمتها قبل القبض فالبيع على حاله بالإجماع ولا يتخير البائع، وعكسه لو غلت قيمتها وازدادت فالبيع على حاله ولا يتخير المشتري ويطالب بالنقد بذلك العيار الذي كان وقت البيع. (فتح القدير: ١٥٥/٧، باب الصرف، دار الفكر)

(وهكذا فى العناية على هامش فتح القدير:١٥٥/٧، باب الصرف، دار الفكر. والكفاية: ٢٧٩/٦، مكتبه رشيدية)

الفتاوى الهندية:

ولو لم تكسد ولكنها رخصت أو غلت لم يفسد البيع وللمشتري ما بقي من الفلوس كذا فى الحاوي. (الفتاوى الهندية: ٢٢٥/٣، الفصل الثالث فى بيع الفلوس، وكذا فى المبسوط للامام السرخسى: ٤٣/١٤)

فتح المعين:

واعلم أن تقييد الاختلاف في رد المثل أو القيمة بالكساد يشير إلى أنها إذا غلت أو رخصت وجب رد المثل بالاتفاق. (فتح المعين للسيدابى السعود: ٦٤١/٢، سعيد)

الجوہرة النيرة:

وقيد بالكساد لأنها إذا غلت أو رخصت كان عليہ رد المثل بالاتفاق كذا فى النهاية. (الجوہرة النيرة: ٢٧٢/٢، باب الصرف، امدادیہ ملتان)

The following is stated in the annotation to *Fatāwā Mahmūdīyyah*:

سئلت عن رجل أقرض آخر مقداراً من الريال المجيدي وقت رواجہ بثلاثين قرشاً، ثم رد المستقرض لہ مثل المقدار الذي استقرضہ منہ بعد أن نزل إلى عشرين قرشاً، فامتنع المقرض من قبولہ، وطلب منہ صرفها على سعر ثلاثين قرشاً، فهل ليس لہ ذلک؟ فالجواب أنہ ليس لہ الامتناع من قبول مثل ما دفع... وفي نتيجة الفتاوىٰ ما نصہ: والمقبوض على وجہ القرض مضمون بمثلہ، وفيها نقلاً عن جامع الفصولين: والواجب فى القرض رد المثل. (الفتاوى الكاملية، ص ٩٢، باب القرض مطلب الواجب فى القرض رد المثل، مكتبة حقانية پشاور). (فتاوىٰ محمودیہ مع تعليقاتها: ٤٠٧/١٦، جامعہ فاروقیہ)

Objection

Some scholars say that consideration ought to be given to the strength and weakness of a currency because it drops with the passage of time. If we do not give consideration to it, money-lenders will suffer losses. This has nothing to do with usury because all that is being done is that we are making up for the drop which occurred after two years. These scholars quote the following statement of 'Allāmah Shāmī rahimahullāh to support their view:

وفى البزازية عن المنتقى غلت الفلوس أو رخصت فعند الإمام الأول والثاني، أولاً ليس عليہ غيرها وقال الثاني ثانياً عليہ قيمتها من الدراہم يوم البيع والقبض وعليہ الفتوىٰ، وہكذا فى الذخيرة والخلاصة عن المنتقىٰ. (فتاوى الشامى: ٥٣٣/٤، كتاب البيوع، مطلب فى احكام النقود، سعيد)

What is the answer to this?

Answer

(1)

A loan is an act of kindness and a favour. The lender must give it with the hope of reward and only take back the amount which he loaned. There is no room to collect more. If he does, it will be usury. The objective of the Sharī'ah is that no profit must be made on a loan. As for the text of 'Allāmah Shāmī rahimahullāh, he quoted it from *Bazzāzīyyah* through the reference of *al-Muntaqā*. *Al-Muntaqā* is written by Hākim Shahīd which contains rare and uncommon rulings. On the other hand, the previously-quoted text of Qādī Khān rahimahullāh is the zāhir ar-riwāyah which is exactly in line with the accepted principles of the Sharī'ah. Preference will therefore be given to it. The following is stated in *Rasm al-Muftī*:

وظاہر المروي ليس يعدل عنہ إلى خلافہ إذ ينقل. (رسم المفتى: ٢٨)

(2)

Khulāsah, Bazzāzīyyah, Dhakhīrah, etc. have quoted from *Muntaqā*. 'Allāmah Shāmī, Ibn Nujaym Misrī and others quoted from *Bazzāzīyyah*. On the other hand, Qādī Khān, Qādī Isbījābī and other commentators and muftīs whose texts were quoted above do not take the strength and weakness of a currency into consideration. They say that it is obligatory to repay only the borrowed amount.

'Allāmah Ibn Nujaym Misrī rahimahullāh writes:

وفى البزازية معزياً إلى المنتقىٰ... وہكذا فى الذخيرة والخلاصة بالعزو إلى المنتقىٰ وفي فتاوىٰ قاضيخان يلزمہ المثل وہكذا ذكر الإسبيجابي قال: ولا ينظر إلى القيمة. (البحر الرائق: ٢٠٢/٦، كتاب الصرف، كوئتة)

بحوث فى قضايا معاصرة:

أما ربط القروض وسائر الديون بقائمة الأسعار، فالمقصود منہ أن لا يرد المستقرض إلى المقرض مبلغ قرضہ فحسب، بل يضيف إليہ قدراً زائداً بنسبة الزيادة في قائمة الأسعار... فلو ألزمنا المقترض أن يدفع إليہ ما قبض منہ، لم

يكن ذلك إلا إكمال المالية المقترضة ...وليس زيادة على المالية المقترضة، فينبغي أن لا تعتبر ہذه الزيادة من الربا الحرام شرعاً.

لكن الحق أن ہذا الدليل لا ينطبق على القواعد الشرعية بحال من الأحوال، لأن القروض يجب فى الشرعية الإسلامية أن تقضى بأمثالها، وہذا أمر لا يختلف فيہ اثنان، ...فبقي الآن تعيين المثلية، فالسوال الأساسي ہنا: ہل يجب أن تتحقق ہذه المثلية فى القدر (أى الكيل، والوزن، والعدد) أو فى القيمة والمالية؟ والذي يتحقق من النظر في دلائل القرآن والسنة ومشاہدة معاملات الناس، أن المثلية المطلوبة فى القرض ہى المثلية فى المقدار والكمية، دون المثلية فى القيمة والمالية. (بحوث فى قضايا معاصرة: ١/١٧٣، ١٧٤)

(3)

When Qāḏī Khān and other muftīs hold opposing views, preference is given to the view of Qāḏī Khān according to ʿAllāmah Shāmī in *Sharḥ ʿUqūd Rasm al-Muftī.*

<u>شرح عقود رسم المفتي:</u>

وسابق الأقوال فى الخانية أى أن أول الأقوال الواقعة في فتاوى الإمام قاضي خان لہ مزية على غيره فى الرجحان لأنہ قال في أول الفتاوىٰ: وفيما كثرت فيہ الأقاويل من المتأخرين اختصرت على قول أو قولين وقدمت ما ہو الأظہر وأفتتحت بما ہو الأشہر إجابة للطالبين وتيسيراً على الراغبين. (شرح عقود رسم المفتى، ص ٣١، وفتاوىٰ قاضيخان على ہامش الہندية: ٢/١)

ʿAllāmah Qāsim ibn Qaṯlūbghā writes:

وہذا ما تيسر على مختصر القدوري مع زيادات نص على تصحيحہا القاضى الإمام فخر الدين قاضي خان في "فتاواه" فإنہ من أحق من يعتمد على تصحيحہ. (مقدمة التصحيح والترجيح، ص ١٣٤)

(4)

Another book written by Hākim Shahīd rahimahullāh is *al-Kāfī* in which he combined the six books – i.e. the zāhir ar-riwāyah – of Imām Muhammad rahimahullāh. In it, the buying-power of a currency has not been taken into consideration. In it he states that it is obligatory to pay back only the same amount.

'Allāmah Shāmī rahimahullāh quotes from *al-Kāfī*:

وفي كافى الحاكم، لو قال أقرضني دانق حنطة فأقرضه ربع حنطة، فعليه أن يرد مثله إلى أن قال وكذلك لو قال أقرضني عشرة دراہم غلة بدينار، فأعطاه عشرة دراہم فعليه مثلها، ولا ينظر إلى غلاء الدراہم ولا إلى رخصها. (فتاوى الشامى: ٥/١٦١، ١٦٢، باب القرض، سعيد)

When there is a contradiction between the two books of Hākim Shahīd rahimahullāh – *al-Kāfī* and *al-Muntaqā* – then preference will be given to the text of *al-Kāfī* provided it is not in conflict with the accepted principles of the Sharī'ah. Rare and uncommon rulings come after that. This has been the methodology of the Hanafī scholars.

'Allāmah Shāmī rahimahullāh writes:

قال في فتح القدير وغيره إن كتاب الكافي ہو جمع كلام محمد في كتبه الست التي ہي كتب ظاہر الرواية انتہى، وفي شرح الأشباه للعلامة إبراہيم البيري اعلم أن من كتب مسائل الأصول كتاب الكافي للحاكم الشهيد وہو كتاب معتمد في نقل المذہب شرحه جماعة من المشايخ منہم شمس الأئمة السرخسي. (شرح عقود رسم المفتى: ١٣)

(5)

This opinion of Imām Abū Yūsuf rahimahullāh is with regard to currencies which are linked to gold and silver. Nowadays, a currency falls under the category of an independent definitional currency. It is neither linked to nor subject to anything.

Muftī Muhammad Taqī 'Uthmānī Sāhib writes:

فاستدل بعض الاقتصاديين على أنه إذا وجب الدين في صورة الفلوس، فالواجب أداء قيمتها إذا طرأ عليها الغلاء والرخص... ولكن هذا الاستدلال غير صحيح، والحقيقة أن مذهب أبي يوسف لا علاقة له بفكرة ربط الديون بقائمة الأسعار... والواقع أن الفلوس فى الأزمنة المتقدمة كانت مرتبطة بنقود الذهب والفضة، تقوم على أساسها، وتعتبر كالفكة للنقود الذهبية والفضية، فكانت عشرة فلوس مثلاً تعادل درهماً واحداً من الفضة، فكان الفلس الواحد يعتبر عشر الدرهم الفضى، ولكن قيمة الفلس هذه لم تكن مقدرة على أساس قيمتها الذاتية، وإنما كانت قيمة رمزية اصطلح عليها الناس، فكان من الممكن أن يتغير هذا الاصطلاح.

والذي يظهر لي ـ والله اعلم ـ أن أساس الخلاف بين أبي يوسف والجمهور مبني على اختلافهم في تكييف هذه الفلوس، فيبدو أن جمهور الفقهاء اعتبروا الفلوس أثماناً اصطلاحية مستقلة غير مربوطة بالدراهم والدنانير ارتباطاً دائماً، فمن اقترض عدداً من الفلوس، فإنه يؤدي نفس العدد دون نظر إلى قيمتها بالنسبة للدراهم، وأما أبو يوسف فاعتبر الفلوس أجزاء اصطلاحية كالفكة للدرهم، فالمقصود بالاقتراض عنده ليس عدد الفلوس وإنما المقصود اقتراض أجزاء للدرهم بمثلها ذلك العدد من الفلوس.

فالحاصل أن قول الإمام أبي يوسف إنما يتأتى في فلوس مرتبطة بثمن آخر ارتباطاً دائماً يجعلها كالأجزاء والفكة لذلك الثمن، أما النقود الورقية اليوم، فليست مرتبطة بثمن آخر ولا معتبرة كالأجزاء والفكة له، وإنما هي أثمان اصطلاحية مستقلة. (بحوث فى قضايا فقهية معاصرة: ١٨٦/١، ١٨٧، ١٨٨)

(6)

Our scholars have always instructed staying away from the filth and stench of usury. They even prohibited anything which is akin to usury and made certain transactions unlawful merely on the fear of usury.

الفتاوى الهندية:

قال ومشايخنا لم يفتوا بجواز ذلك فى العدالى والغطارفة لأنها أعز الأموال في ديارنا فلو أبيح التفاضل فيه ينفتح باب الربا كذا فى الهداية والتبيين. (الفتاوى الهندية: ١٠٦/٣)

الهداية:

(ومشايخنا) يعني مشايخ ما وراء النهر من بخارى وسمرقند (لم يفتوا بجواز ذلك) أى بيعها بجنسها متفاضلاً (فى العدالى والغطارفة) مع أن الغش فيها أكثر من الفضة (لأنها أعز الأموال في ديارنا، فلو أبيح التفاضل فيها ينفتح باب الربا) الصريح، فإن الناس حينئذٍ يعتادون التفاضل فى الأموال النفيسة فيتدرجون إلى ذلك فى النقود الخالصة فمنع ذلك حسماً لمادة الفساد. (الهداية مع فتح القدير: ١٥٣/٧، باب الصرف، دار الفكر)

(7)

This issue is similar to usurpation. If a person usurps something and its value drops, and he then returns it, he will have to return what he had usurped. The rise or fall in the value of that item is not considered.

فتاوى الشامى:

ولو وجده (المغصوب) في بلد الغصب وانتقص السعر يأخذ العين لا القيمة يوم الغصب. (فتاوى الشامى: ١٨٢/٦، سعيد)

الهداية:

بخلاف تراجع السعر إذا رد فى مكان الغصب لأنه عبارة عن فتور الرغبات دون فوات الجزء. (الهداية: ٣٧٥/٣)

Further reading: *Buhūth Fī Qadāyā Fiqhīyyah Muʿāsirah*, vol. 1, pp. 173-193; *Jadīd Fiqhī Mabāhith*, 2; *Fatāwā Mahmūdīyyah Maʿa Taʿlīqāt*, vol. 16, pp. 405-407.

Allāh taʿālā knows best.

Preconditioning a loan with returning a higher quality item

<u>Question</u>

Zayd gave 10kgs of average quality wheat as a loan to ʿAmr. He said to him: "When you return the loan after one month, you will have to give me high quality wheat." Is this agreement permissible?

<u>Answer</u>

When there is an exchange of amwāl-e-ribawīyyah (usurious items), it has to be a cash transaction and there has to be equality. No consideration is given to inferior or superior quality. However, a credit transaction is excluded. This is why the Sharīʿah permits it even though it is paid back at a later date. At the same time, equality is essential and necessary in a credit transaction as well. Therefore, when returning it, the quantity and quality has to be the same. Laying down a condition of returning high quality wheat is synonymous to making a profit which is impermissible in a transaction of this nature.

<u>البحر الرائق:</u>

ولا يجوز قرض جر نفعاً بأن أقرضه دراهم مكسورة بشرط رد صحيحة أو أقرضه طعاماً في مكان بشرط رده في مكان آخر. (البحر الرائق: ١٢٢/٦، تتمة فى مسائل القرض، كوئتة)

<u>بدائع الصنائع:</u>

وأما (الشرائط) الذي يرجع إلى نفس القرض فهو أن لا يكون فيه جر منفعة فإن كان لم يجز نحو ما إذا أقرضه دراهم غلة على أن يرد عليه صحاحاً أو أقرضه وشرط شرطاً له فيه منفعة لما روي عن رسول الله صلى الله عليه وسلم أنه نهى عن قرض جر نفعاً ولأن الزيادة تشبه الربا لأنها فضل لا يقابله عوض والتحرز عن حقيقية الربا وعن شبهة الربا واجب، هذا إذا كانت الزيادة مشروطة فى القرض. (بدائع الصنائع: ٣٩٥/٧، سعيد)

وفي رد المحتار: قوله كل قرض جر نفعاً حرام، أى إذا كان مشروطاً. (رد المحتار: ١٦٥/٥، سعيد)

<u>اعلاء السنن:</u>

لا نزاع في حرمة الفضل المشروط فى القرض، سواء كان وصفاً أو قدراً. (اعلاء السنن: ٥٢١/١٤، ادارة القرآن)

'Itr Hidāyah:

Every loan which is preconditioned by a profit [or some sort of benefit] is usury. Rasūlullāh sallallāhu 'alayhi wa sallam said:

كل قرض جر نفعا فهو ربا.

Every loan which draws a profit is usury.

وللاستزادة انظر: (الفتاوى الهندية: ٢٠٢/٣. ومرقات المفاتيح: ٩٩/٦. واعلاء السنن: ٥٢١/١٤. والفقه الحنفى فى ثوبه الجديد: ٢٢٢/٤. وفتاوى محموديه: ٤١٣/١٦، جامعه فاروقيه. جديد معاملات كے شرعى احكام: ١٨٤/١. كتاب الفتاوى: ٣٧٣/٥.

Allāh ta'ālā knows best.

Imposing a monetary fine for delaying payment

<u>Question</u>

You stated in volume four of *Fatāwā Dār al-'Ulūm Zakarīyyā* that some 'ulamā' permit monetary fines. Many proofs were presented for it. My question is that if a debtor constantly delays in repaying his debt – he had taken a loan of 100 000 which was to be paid on the 1st of September – can I charge him a monetary fine for the delay? For example, he will have to pay two thousand for two month's delay and three thousand for three month's delay. Will this be permissible?

<u>Answer</u>

This is totally forbidden. It is not permissible to collect 102 000 in return for a loan of 100 000. This is classified as usury in the Qur'ān. That is, the loaned amount increases with the increase in the

repayment time. In other words, it is not permissible to lay a fine for a loan. Yes, the scholars differ on the issue of monetary fines for committing an inappropriate action. One group says that it is permissible. Details in this regard can be found in volume four of *Fatāwā Dār al-ʿUlūm Zakarīyyā*.

Also, the sale of a time-period and the collection of a price for it are also impermissible. (*al-Hidāyah*, vol. 3, p. 74)

وكذا فى التبيين: لأن الأجل ليس بمال متقوم فلا يقابله شيء من الثمن. (تبيين الحقائق: ٤/٧٨)

والمبسوط للإمام السرخسي: فإن مبادلة الأجل بالمال ربا (ألا ترى) أن الشرع حرم ربا النساء وليس ذلك إلا شبهة مبادلة المال بالأجل فحقيقة ذلك يكون رباً حراماً أولى.

In pre-Islamic times, the price used to be increased with the increase in the period of the loan.

وفي تكملة فتح الملهم: ربا النسيئة: وقد عرفه الإمام أبو بكرالجصاص بقوله: هو القرض المشروط فيه الأجل، وزيادة مال على المستقرض... وكان هذا الربا محرماً في سائر الأديان السماوية - أخرج ابن جرير عن ابن جريج قال: كانت بنو عمرو بن عمير بن عوف يأخذون الربا من بنى المغيرة، وكانت بنو المغيرة يربون لهم فى الجاهلية فجاء الإسلام ولهم عليهم مال كثير. وقد أخرج ابن أبي حاتم والشافعي عن عمرو بن الأحوص أن رسول الله صلى الله عليه وسلم قال: ألا أن كل ربا كان فى الجاهلية موضوع عنكم كله لكم رؤوس أموالكم لا تظلمون ولا تظلمون. (تكملة فتح الملهم: ١/٥٦٧، ٥٦٨)

Allāh taʿālā knows best.

Collecting a debt from a consignee

Question

Zayd is owing ʿUmar some money. Although he is able to, Zayd is not paying it back. Zayd's son and a worker work in Zayd's shop. Does the worker or Zayd's son have the right to give to ʿUmar something from

the shop which equals the value of the debt or some amount less than it?

Answer

'Umar can collect the amount owed to him or less than it from Zayd or from the person whom Zayd entrusted. However, neither the worker nor Zayd's son has the right to pay a creditor from the wealth of the original owner, i.e. Zayd.

الهداية:

كما إذا كانت له ألف درهم وديعة عند إنسان وعليه ألف لغيره فلغريمه أن يأخذه إذا ظفر به وليس للمودَع أن يدفعه إليه. (الهداية: ٢٧٦/٣، كتاب الوديعة)

درر الحكام شرح مجلة الاحكام:

وأما إذا كان مطلوب الدائن من جنس الوديعة فللدائن المرقوم عند ظفره أن يأخذ من المستودع مقداراً كافياً لمطلوبه، وإن كان إعطاء المستودع غير جائز، ولا يلزم المستودع الضمان في هذه الحالة. (درر الحكام شرح مجلة الاحكام: ٢٧٠/٢)

The gist of these texts is that if a loaned amount cannot be collected from the debtor, it can be collected from the one whom he entrusted. But the latter does not have the right to give the amount of the debt to the creditor. Remember, that a shop may have one's son, worker or hired labourer. A specifically hired labourer is like a mūda' (consignee/entrusted person).

كما هو المصرح فى كتاب الإجارة. (الهداية: ٣١٠/٣، تحت باب ضمان الاجير)

We learn from the above that it is not permissible for the mūda' to give it, but what if he does give it? Will there be a recompense or not? The jurists differ in this regard. 'Allāmah Ibn Nujaym Misrī rahimahullāh says that the mūda' will be liable. The same is inferred from the text of *Fatāwā Walwālijīyyah*. 'Allāmah Badr ad-Dīn – the author of *Jāmi' al-Fusūlayn* – quotes two views. *Fatāwā Hindīyyah* gives preference to the

view that there will be no liability. The same is quoted in *Sharh al-Majallah*.

الاشباه والنظائر:

ولو قضى المودَع بها دين المودِع ضمن على الصحيح. (الاشباه والنظائر: ٤٠٧/٢، الفن الثانى الفوائد)

الفتاوى الولوالجية:

رجل له عند رجل ألف درهم وديعة، ولرجل على المودِع ألف درهم دين، فقضى المودَع دينه، مما عنده من الوديعة بغير إذن المودِع، فهو بالخيار إن شاء ضمن المودَع، وأخذ وديعته، وسلم الألف للآخذ، وليس للمودَع أن يرجع به على أحد لأنه متبرع بقضاء دينه عنه، وإن شاء أجاز القضاء، ولا شيء له على المودَع. (الفتاوى الولوالجية: ٩٣/٤، الفصل الخامس فى المسائل المتفرقة)

وفي جامع الفصولين: والمودَع لو قضى دين ربها والدين من جنس الوديعة قيل ضمن وقيل لا. (جامع الفصولين: ١٥٢/٢)

(وكذا فى مجمع الضمانات: ٢١٩/١، الفصل الثانى فيمن يضمن المودع بالدفع اليه)

وفى الفتاوى الهندية: المودَع إذا قضى دين المودِع من مال الوديعة يضمن وإن كان من جنس الوديعة قيل: لا يضمن وهو المختار عند البعض كذا في خزانة المفتين. (الفتاوى الهندية: ٣٥٨/٤)

(وكذا فى شرح المجلة لمحمد خالد الاتاسى: ٢٧٣/٣، المادة: ٧٩٣. ودرر الحكام شرح مجلة الاحكام لعلى حيدر: ٢٧١/٢)

Allāh ta'ālā knows best.

When a debtor hands over the responsibility of payment to a third person

Question

Bakr owes money to Khālid, while Khālid owes money to ʿUmar. Khālid said to ʿUmar: "Do not collect the money from me; take it from Bakr because he owes me." Bakr agreed to this suggestion. Now ʿUmar says: "I will collect my money from Khālid," but Khālid is refusing to pay and saying: "You had agreed to collect it from Bakr." Is Khālid's refusal valid? In short, if a debtor hands over the responsibility of paying his debt to his own debtor, can his creditor collect it from the latter?

Answer

When a debtor hands over the payment of his debt to a third person, and the latter accepts the responsibility, the creditor cannot demand it from his debtor. Thus, in this case, ʿUmar will collect his debt from his debtor's debtor – Bakr – and not from Khālid. Yes, if the amount gets perished, he may collect it from his debtor. For example, the third person passes away and leaves behind nothing, or he rejects the handing over of the responsibility for payment and there is no witness to it.

قال وإذا تمت الحوالة بالقبول برئ المحيل من الدين قال فى الفتح ہذا قول طائفة من المشائخ وہو الصحيح من المذہب... ولا يرجع المحتال على المحيل إلا أن يتوى حقہ ...والتوى عند أبى حنيفة أحد الأمرين إما أن يجحد الحوالة ويحلف ولا بينة لہ عليہ أو يموت مفلساً لأن العجز عن الوصول يتحقق بكل منہما وہو التوى فى الحقيقة. (الہداية مع فتح القدير: ٣٤٧/٦)

Allāh taʿālā knows best.

BORROWING, LENDING AND TRUST-KEEPING

Taking back a loaned item before the due date

Question

A person loaned a plot of land to someone for three years so that he could plant trees, seeds, etc. He wants to take back the land after one year. The borrower says: "I will suffer losses if I were to return it so quickly." What should be done? Will the owner of the land have to pay compensation for digging up the seeds? If he will have to pay, how much will it be?

Answer

The lender has the right to ask the borrower to empty the land before the due date. However, it is makrūh to do this. Yes, the lender will have to pay for the losses which the borrower will suffer. He will have to pay compensation. The lender gave the land so that the person could do farming for three years. He now wants it back within one year. The borrower will be asked to cut his crop and empty the land. Had the crop remained for three years, its value would have been – for example – five thousand rands. At the time when he is emptying it, its value – for example – is two thousand rands. The loss of three thousand rands will have to be paid by the lender. If the lender wants to take the crop as well, and the borrower is prepared to give it to him, then the lender will have to pay whatever its value is.

If uprooting the trees could damage the land, the owner of the land has the right to reserve the trees for himself and pay the full value of them.

الدر المختار

وإن وقَّت العارية فرجع قبله كلفه قلعهما وضمن المعير للمستعيرما نقص البناء والغرس بالقلع بأن يقوم قائماً إلى المدة المضروبة وتعتبر القيمة يوم الاسترداد، بحر. وفي رد المحتار: (قوله ما نقص البناء) ہذا مشى عليه فى الكنز والهداية، وذكر فى البحر عن المحيط ضمان القيمة قائماً إلا أن يقلعه المستعير ولا ضرر فإن ضر فضمان القيمة مقلوعاً، وعبارة المجمع: وألزمناه

الضمان فقيل ما نقصهما القلع، وقيل قيمتهما ويملكهما، وقيل إن ضر يخير المالک يعنی المعير يخير بين ضمان ما نقص وضمان القيمة، ومثله في درر البحار والمواهب والملتقى وكلهم قدموا الاول وبعضهم جزم به وعبر عن غيره بقيل فلذا اختاره المصنف وهي رواية القدوري والثاني رواية الحاكم الشهيد كما في غرر الأفكار. (قوله قائماً) فلو قيمته قائماً فی الحال أربعة وفی المآل عشرة ضمن ستة، شرح الملتقى. (الدر المختار مع رد المحتار: ٥/٦٨١، سعيد)

شرح المجلة

وإن كان وقَّت العارية ورجع قبل الوقت، صح رجوعه، لما ذكرنا (أی أن العارية غير لازمة) ولكنه يكره، لما فيه من خلف الوعد، وضمن المعير ما نقص البناء والغرس بالقلع لأنه مغرور من جهته حيث وقَّت له، فالظاهر هو الوفاء بالوعد فيرجع عليه دفعاً للضرر عن نفسه، كذا ذكره القدوري فی المختصر. وذكر الحاكم الشهيد أنه يضمن رب الأرض للمستعير قيمة غرسه وبنائه، ويكونان له إلا أن يشاء المستعير أن يرفعهما، ولا يضمنه قيمتهما فيكون له ذلک، لأنه ملكه، قالوا: إذاكان فی القلع ضرر بالأرض فالخيار إلى رب الأرض، لأنه صاحب أصل والمستعير صاحب تبع، والترجيح بالأصل. (كذا فی الهداية)

قلت: وحاصل ما ذكروه أن هذه المسئلة على أربعة أوجه...الثالثة: أن تكون موقتة والقلع لا يضر، فالمستعير يؤمر بالقلع ويضمن له المعير ما نقص البناء والغرس، على ما وضحته هذه المادة، وهذه رواية القدوري وعليها مشت المجلة تبعاً للهداية والكنز وغيرهما، وأما على رواية الحاكم الشهيد، فالمعير يتملكهما بقيمتهما قائمين، إلا أن يشاء المستعير قلعهما، ولا يضمن المعير شيئاً.

الرابعة: أن تكون موقتة والقلع يضر بالأرض، فالمعير مخير بين أن يتملكهما بقيمتهما قائمين أو يأمر المستعير بالقلع ويضمن نقص البناء والغرس، على ما تبين في متن ہذه المادة. (شرح المجلة لمحمد خالد الاتاسى، ٣/٣٣٥، المادة: ٨٣١)

Note: This ruling applies to a building and a tree. If a person is loaned a piece of land for agricultural farming, then whether a time period has been specified or not, the lender cannot ask the borrower to vacate it before the crop matures. Yes, he may pay him an equitable amount.

إذا كانت إعارة الأرض للزرع سواء كانت موقتة أو غير موقتة ليس للمستعير أن يرجع بالإعارة ويسترد الأرض قبل وقت الحصاد.

عبارة الكنز وغيره: ولو استعارہا ليزرعها، لم تؤخذ منه حتى يحصد الزرع استحساناً وقَّت أو لم يوقِّت. قال الزيلعي: فيترک بأجر المثل، لأن فيه مراعاة الحقين، كما فى الإجارة إذا انقضت المدة و الزرع لم يدرک. (شرح المجلة، لمحمد خالد الاتاسى: ٣/٣٣٧، المادة: ٨٣٢)

Allāh taʿālā knows best.

Taking back a building which was loaned

Question

A person gave a building to serve as a place of worship. The people of the Tabligh Jamāʿat began performing ṣalāh there. A well-wisher – thinking that it is a place of worship – had a room constructed in it. Later on, the Jamāʿat people constructed a masjid and the owner of the building sold the building. Now the well-wisher who had a room constructed in it wants to be reimbursed for the room so that he may spend the money for some other noble purpose. What is the ruling of the Sharīʿah?

Answer

The owner of the building had loaned it as a place of worship without specifying any period. Therefore, he may take it back whenever he wants. The person who constructed the room will be instructed to demolish the room and have it empty as it was. If the building will not suffer any damage on account of demolishing the room, the owner cannot stop the person from demolishing it. Yes, if the building or the

land could suffer some damage, the owner of the building has the right to leave the room as it is and pay the value of its debris. If he wants, he may order for it to be demolished.

In the above case, because the owner sold the building, he will pay the value of its debris so that the well-wisher may spend the money for some other good cause.

استعارة الأرض لغرس الأشجار والبناء عليها صحيحة، لكن للمعير أن يرجع بالإعارة متى شاء، فإذا رجع لزم المستعير قلع الأشجار ورفع البناء ...لأن العارية غير لازمة، فكان له أن يرجع أي وقت شاء، وإذا صح الرجوع بقي المستعير شاغلاً أرض المعير، فيكلف تفريغها، ثم إن لم يكن وقّت العارية، فلا ضمان عليه، لأن المستعير مغتر غير مغرور، حيث اعتمد إطلاق العقد من غير أن يسبق منه الوعد.

قلت: وحاصل ما ذكروه أن هذه المسئلة على أربعة أوجه، لأنها إما غير موقتة أو موقتة، وعلى كل فإما أن لا يضر القلع بالأرض، أو يضر، ففى الصورة الأولى، وهي ما إذا كانت غير موقتة والقلع لا يضر، يؤمر المستعير بالقلع ولا يضمن له المعير شيئاً، لأن المستعير مغتر لا مغرور.

الثانية: أن تكون غير موقتة والقلع يضر، فالمعير مخير بين أن يتملك البناء والغرس بقيمتهما مقلوعين، وبين أن يكلف القلع ولا ضمان عليه. (شرح المجلة، لمحمد خالد الاتاسى، ٣/٣٣٦، المادة: ٨٣١)

وللمزيد أنظر: (شرح العناية: ٩/١٤، على هامش فتح القدير، دار الفكر. والدر المختار مع رد المحتار: ٦/٢٤٨، سعيد. والفتاوى الهندية: ٤/٣٧٠)

Allāh taʿālā knows best.

Taking back a land before the specified date

<u>Question</u>

Zayd loaned a plot of land to ʿUmar so that the latter could construct a building on it. He said to him that he may use it for twenty years.

ʿUmar constructed an informal building. Three years later, Zayd became angry at ʿUmar and wants to evict him. ʿUmar considers this to be a deception. If ʿUmar were to demolish the house, can he ask Zayd to pay for the losses which he incurred?

Answer

ʿUmar can ask Zayd to pay for the losses. Assuming the building was valued at twenty thousand, and after demolishing it, its debris is valued at ten thousand; then ʿUmar can ask Zayd to pay this ten thousand. Yes, if he gave the land for agricultural purposes and he asks for the land before the due date, he will have to wait until the crop matures. Zayd can charge ʿUmar a rental for the period from the time he asked for the land to be returned until the maturity of the crop.

Allāh taʿālā knows best.

The borrower paying a compensation

Question

A student borrowed a mobile phone from a fellow student after obtaining the latter's permission. After using it, the student went to return it that very night but the owner of the phone was asleep. The next day, the madrasah authorities conducted a raid, found the phone and broke it. The student who lent the phone is now asking the borrower to pay the value of the phone. What is the Sharīʿah ruling? Is it obligatory on him to pay the value of the phone?

Answer

The Sharīʿah ruling with regard to a borrowed item is that for as long as it remains with the borrower, it will be classified as an amānah without responsibility. This means that it is necessary for the borrower to safeguard the item as an entrusted (amānah) item is safeguarded. However, if the item breaks or is damaged, there is no responsibility or accountability on the borrower. In other words, he will not be liable to pay any compensation in the case where the item breaks or is damaged coincidentally. However, if he misused the item or gave it to irresponsible people, and the item was damaged or the person damaged it or broke it intentionally; then in all these cases it will be necessary for the borrower to pay compensation.

Now look at the above issue in the light of the Sharīʿah. It appears that when the madrasah authorities asked for the phone, the borrower spoke a lie by saying that he does not have it with him, or when they asked him repeatedly, he remained silent. He has committed an act of transgression due to which the madrasah authorities broke the phone.

Had the borrower clearly stated that the phone belongs to such and such student, and they may attach a label with his name on it, the madrasah authorities would probably not have broken the phone. If the case is as we described, the borrower will have to pay a compensation. If the madrasah authorities broke the phone without any reason, the borrower will not be liable to pay a compensation. However, the second scenario is far fetched.

(والعارية أمانة إن هلكت من غير تعد لم يضمن الخ) إن هلكت العارية فإن كان بتعد أوجب الضمان بالإجماع وإن كان بغيره لم يضمن. (شرح العناية على هامش فتح القدير: ٩/٧، دار الفكر)

(ولا تضمن بالهلاک من غير تعد) وشرط الضمان باطل كشرط عدمہ فى الرہن خلافاً للجوہرة. وفى الشامية: (قولہ بالهلاک) ہذا إذا كانت مطلقة فلو مقيدة كأن يعيره يوماً فلو لم يردہا بعد مضيہ ضمن إذا ہلكت كما في شرح المجمع وہو المختار كما فى العمادية. قال فى الشرنبلالية: سواء استعملہا بعد الوقت أو لا وذكر صاحب المحيط وشيخ الإسلام: إنما يضمن إذا انتفع بعد مضي الوقت لأنہ حينئذٍ يصير غاصباً، أبو السعود. (الدر المختار مع رد المحتار: ٥/٦٧٩، كتاب العارية، سعيد)

<u>شرح المجلة</u>

العارية أمانة في يد المستعير فإذا ہلكت أو ضاعت أو نقصت قيمتہا بلا تعد ولا تقصير لا يلزم الضمان... وإذا حصل من المستعير تعد أو تقصير بحق العارية ثم ہلكت أو نقصت قيمتہا فبأي سبب كان الهلاک أو النقص يلزم المستعير الضمان. (شرح المجلة: ٣/٣١٢، المادة: ٨١٣، ٨١٤)

<u>الفتاوى الهندية</u>

ولو رد الثوب المستعار فلم يجد المعير ولا من في عيالہ فأمسكہ الليل وہلک لا يضمن ولو وجد من في عيالہ ولم يردہ يضمن. (الفتاوى الهندية: ٤/٣٧٠)

وللمزيد أنظر: (البحر الرائق: ٦/٢١٧، كوئته. والفتاوى الهندية: ٤/٢٦٣. وحاشية الطحطاوى على الدر المختار: ٣/٣٨٦. وفتح باب العناية: ٣/٣٤٦)

Allāh taʿālā knows best.

Damages caused to a borrowed item

Question

Zayd borrowed ʿAmr's car. Some damage occurred to the car while he was using it. It is obligatory on Zayd to pay for the damages? Is there any difference in the ruling if the damage was caused wittingly or unwittingly? What if the damage was caused because he was driving beyond the speed limit?

Answer

If Zayd drove the car in a regular and standard manner, and some damage occurred without his committing any offence, then he is not accountable and he will not be liable to pay any compensation. Yes, if he drove in an irregular manner and committed an offence, Zayd will be responsible for the damage. Similarly, if he drove beyond the speed limit and broke the law, and some damage occurred, Zayd will be responsible for the damage.

وأما حكمها (العارية) فهو ملك المنفعة للمستعير بغير عوض أو ما هو ملحق بالمنفعة عرفاً وعادةً عندنا كذا فى البدائع، والعارية أمانة إن هلكت من غير تعد لم يضمنها ... ولو تعدى ضمن بالإجماع نحو أن يحمل عليها ما يعلم أنها لا تحمل مثله وكذلک إذا استعملها ليلاً أو نهاراً فيما لا يستعمل فيه الدواب فى العرف والعادة، فعطبت ضمن قيمتها كذا في غاية البيان. (الفتاوى الهندية: ٤/٣٦٣، كتاب العارية)

شرح العناية

إن هلكت العارية، فإن كان بتعد كحمل الدابة ما لا يحمله مثلها أو استعمالها استعمالاً لا يستعمل مثلها من الدواب أوجب الضمان بالإجماع. (شرح العناية على هامش فتح القدير: ٩/٧، كتاب العارية، دار الفكر)

If the lender did not specify the time, place and method of using the item; the borrower has the right to use it whenever and however he wants. In such a case, if any damage is suffered, the borrower will not be responsible for anything. However, if the item is used in a manner which is not normally done, then although he received permission to use it whenever and however he wants, he will have to pay compensation. For example, a person borrows a cycle or motor vehicle and drives it on a public road recklessly or beyond the speed limit. He then meets in an accident. The borrower will be responsible to pay for the damages. Similarly, he will be responsible to pay for the damages of the other party. For example, someone got injured or suffered monetary loss. The borrower will have to pay compensation for all this.[1]

Allāh taʿālā knows best.

Renting out a borrowed house

Question

Bakr loaned a house to Khālid. Khālid divided it into two sections. He lives in one section and he gave the other section on rent. He collects a monthly rental for it. Is it permissible to do this? Who has right over the rent?

Answer

It is not permissible for Khālid to give the borrowed house on rent without obtaining permission from the owner. This rental is invalid. It will be obligatory to give the rental which he receive in charity. Yes, if Bakr permitted him to rent it out, it will be permissible.

ليس للمستعير أن يواجر المستعار من غيره وإن كانت الإعارة تمليكاً عندنا كذا فى الظهرية، فإن آجر فعطب ضمن حين سلمه إلى المستأجر كذا فى الكافي، وكان الأجر لـه ويتصدق بـه في قول أبي حنيفة كذا فى المحيط. (الفتاوى الهندية: ٤/٣٦٤، كتاب العارية، باب فى التصرفات)

المجلة

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[1] *Islāmī Fiqh*, vol. 2, p. 498.

ليس للمستعير أن يوجر العارية ولا أن يرہنها بدون إذن المعير. (مجلة: ٣/٣٢٥، المادة: ٨٢٣)

تبيين الحقائق

قولہ (ولا يوجر) لأن الإجارة لازمة فيلزم المعير زيادة الضرر لأنہ لو جازت الإجارة من المستعير لما جاز للمعير أن يرجع عليہ حتى يفرغ مدتها فيتضرر فلا يلزمہ بغير رضاه. وفي حاشية الشلبي: قال: فإذا فعل ذلک وآجرہا صار بمنزلة الغاصب والغاصب إذا فعل يملک الأجرة ويتصدق بها لأنها حصلت بسبب خبيث وہو استعمال مال الغير فكان سبيلہ التصدق. (تبيين الحقائق مع الحاشية: ٥/٨٥، كتاب العارية، ط: ملتان)

The text of *Majallah* contains the words بدون إذن المعير and the text of *Tabyīn* states بغير رضاه. We learn from both that it ought to be permissible to rent out a borrowed item provided the permission of the lender is obtained.

Allāh taʿālā knows best.

Compensation when a person is paid for the service of safekeeping

Question

ʿAmr gave a valuable item to Bakr for safekeeping. He pays him monthly for his service of safekeeping. Incidentally, there was a flood and the valuable item got destroyed while under Bakr's protection. ʿAmr is asking for the item or its value. Will Bakr be liable? In other words, when an item is given for safekeeping and the person is paid for his services, will it be necessary to pay for damages in the case where it is damaged or destroyed?

Answer

The Sharīʿah permits the protection of a wadīʿat and amānat onto a person, and specifying an amount to be paid for its safekeeping. In such a case, if the item is destroyed while with the person and it was possible to protect it, then he will be liable to pay for damages. If not, he will not be liable. In the above case, Bakr did not default in the item's protection. Rather, he had placed it in a safe place, but it got

destroyed. Bakr is not liable to pay for damages. However, if Bakr defaulted in its protection, he will have to pay for damages.

المودع إذا شرط الأجرة للمودع على حفظ الوديعة صح ولزم عليه كذا في جواهر الأخلاطي. (الفتاوى الهندية: ٤/٣٤٢، كتاب الوديعة)

الهداية

إذا هلک بسبب يمكن الاحترز عنه كالغصب والسرقة فإن كان التقصير من جهته فيضمنه كالوديعة إذا كانت بأجر بخلاف ما لا يمكن الاحتراز عنه كالموت حتف أنفه والحريق الغالب وغيره لأنه لا تقصير من جهته. (الهداية: ٣/٣٠٨، باب ضمان الاجير)

المجلة

الوديعة أمانة في يد الوديع فإذا هلكت بلا تعد من المستودع وبدون صنعه وتقصيره فى الحفظ لا يلزم الضمان، فقط إذا كان الإيداع بأجرة فهلكت أو ضاعت بسبب يمكن التحرز عنه لزم المستودع ضمانها. (مجلة: ٣/٢٤٢، المادة: ٧٧٧، فصل فى احكام الوديعة وضمانها)

الدر المختار

وهي (الوديعة) أمانة، هذا حكمها مع وجوب الحفظ والأداء عند الطلب واستحباب قبولها، فلا تضمن بالهلاک إلا إذا كانت الوديعة بأجر. (الدر المختار: ٥/٦٦٤، سعيد)

وفى البزازية: لو جعل للكفيل أجراً لم يصح، وذكر الزيلعي أن الوديعة بالأجر مضمونة، وفى الصيرفية من أحكام الوديعة إذا استأجر المودِع المودَع صح. (الاشباه والنظائر: ٢/٣٩٩)

ومثله في تبيين الحقائق، وزاد بقوله: والمتاع في يده (أى الأجير المشترك) غير مضمون بالهلاك... بخلاف الوديعة بأجر لأن الحفظ واجب عليه مقصوداً ببدل (فيضمن). (تبيين الحقائق: ٥/١٣٥، ملتان)

رد المحتار

وأما من جرى العرف بأنه يأخذ في مقابلة حفظه أجرة يضمن، لأنه وديعة بأجرة لكن الفتوىٰ على عدمه، سائحاني. (رد المحتار: ٥/٦٦٤، كتاب الايداع، سعيد)

خلاصة الفتاوىٰ

فإن شرط عليه الضمان إذا هلك يضمن في قولهم جميعاً، لأن الأجير المشترك إنما لا يضمن عند أبي حنيفة إذا لم يشترط عليه الضمان، أما إذا شرط يضمن، قال الفقيه أبو الليث، الشرط وعدم الشرط سواء، لأنه أمين، واشتراط الضمان على الأمين باطل، وبه يفتىٰ. (خلاصة الفتاوىٰ: ٣/١٣٧)

Imdād al-Ahkām:

Where payment is given for the service of safekeeping, the verdict is that one does not have to pay for damages.[1]

In short, if the item is destroyed while under the protection of the person who is paid for his service of protection, there is difference of opinion whether he will be liable to pay compensation or not. There is a difference on the fatwā as well. I am of the view that since the owner made it a point to pay for the safekeeping of the item, and also said to the person that he is liable, then the fatwā of paying compensation will be issued. This is more so in our times when people are generally lackadaisical.

Allāh taʿālā knows best.

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[1] *Imdād al-Ahkām*, vol. 3, p. 637; *Īdāh an-Nawādir*, p. 172.

Using the entrusted item in a business

Question

Zayd gave R100 000.00 rands to 'Umar for safekeeping. After a few days, 'Umar used the money in his business. After a year, he earned R200 000.00 rands from it. 'Umar obviously has to pay R100 000.00 rands to Zayd. What about the profit which he heard on account of it? Is it 'Umar's or Zayd's? 'Umar conducted the business without permission for himself; and not for Zayd. Is it obligatory to give the profit in charity?

Answer

If 'Umar entered into a transaction with the entrusted amount, and paid that particular money, then whatever profits he makes from the transaction will have to be given in charity. If he entered into a transaction with the entrusted amount, but paid for it with some other money; or entered into a general transaction and then paid for it with the entrusted amount; then in these cases, it will be obligatory to give the profit in charity. He cannot use it for himself. Some scholars say that even if a transaction was entered into on money in general, even then it will be obligatory to give the profit in charity. Caution demands that it be given in charity.

فإن كانت الوديعة دراہم فالدراہم يشترى بها ثم ينظر إن اشترى بها بعينها ونقدہا لا يطيب لہ الفضل وإن اشترى بها ونقد غيرہا أو اشترى بدراہم مطلقة ثم نقدہا يطيب لہ الربح ہنا لأن الدراہم لا تتعين بنفس العقد ما لم ينضم إليہ التسليم ولہذا لو أراد أن يسلم غيرہا لہ ذلک فأما بالقبض يتعين نوع تعين ولہذا لا يملک استرداد المقبوض من البائع ليعطيہ مثلها فلہذا قلنا إذا استعان فى العقد والنقد جميعاً بالدراہم الوديعة أو المغصوبة لا يطيب لہ الفضل. (المبسوط للامام السرخسى: ۱۱/۱۱۲، كتاب الوديعة)

الدر المختار:

لو تصرف فى المغصوب والوديعة بأن باعہ وربح فيہ إذا كان ذلک متعيناً بالإشارة أو بالشراء بدراہم الوديعة أو الغصب ونقدہا يتصدق بربح حصل

فيهما إذا كانا مما يتعين بالإشارة وإن كانا مما لا يتعين فعلى أربعة أوجه فإن أشار إليها ونقدها فكذلك يتصدق وإن أشار إليها ونقد غيرها أو أشار إلى غيرها ونقدها أو أطلق ولم يشر ونقدها لا يتصدق فى الصور الثلاث عند الكرخي قيل: وبه يفتى. (الدر المختار: ٦/١٨٩، سعيد)

وكذا في حاشية الطحطاوي على الدر المختار وزاد بقوله: والمختار أنه لا يحل مطلقاً كذا فى الملتقى ولو بعد الضمان هو الصحيح كما في فتاوى نوازل واختار بعضهم الفتوى على قول الكرخي في زماننا لكثرة الحرام وهذا كله على قولهما وعند أبي يوسف لا يتصدق بشيء منه كما لو اختلف الجنس ذكره الزيلعي. (حاشية الطحطاوى على الدر المختار: ٤/١٠٥ وكذا فى الفتاوى السراجية، ص: ٤٤٨، باب المتفرقات)

Allāh taʿālā knows best.

When the entrusted item is less than what was given

Question

Khālid requested Bakr to keep some money for him as a trust. Bakr declined. Khālid persisted, so Bakr took the amount and stored it in a safe place. After many days, Khālid asked for the money. Bakr took it out and handed it over to Khālid. When he checked it, he found that it was less than what he had given. Bakr is saying that he never touched the money. Now who is responsible for it?

Answer

The ruling with regard to an entrusted item is that if the entrusted person was neither heedless nor careless with regard to it, and it gets less or destroyed, then he is not liable to pay anything. If he displayed shortcomings in safeguarding it, was careless about it, did something contrary to what the person asked him to do with it, or used it without the person's permission – then in all these cases he will be liable to pay compensation.

In the above case, if Bakr is speaking the truth and the money was not moved from where he had stored it, and Khālid had agreed to storing it in that place, then Bakr will not be liable. Rasūlullāh ṣallallāhu ʿalayhi wa sallam said that if an item is destroyed while by a person

who borrows it or without an entrusted person being deceptive, and there was no treachery in it, then he will not be liable for it.

عن عمرو بن شعيب عن أبيه عن جده عن النبي صلى الله عليه وسلم قال: ليس على المستعير غير المغل ضمان، ولا على المستودع غير المغل ضمان. (رواه الدارقطني: ٣/٤١/١٦٨)

الإيداع هو تسليط الغير على حفظ ماله والوديعة ما يترك عند الأمين... وهي أمانة فلا تضمن بالهلاك لقوله عليه الصلاة والسلام: لا ضمان على مؤتمن. رواه الدارقطني، ولأن المودع متبرع فى الحفظ وما على المحسنين من سبيل ولأن يده يد المالك فيكون هلاكها في يد المالك فلا يجب الضمان ولأن للناس حاجة إلى الإيداع فلو ضمن المودع لامتنع الناس عن قبول الودائع فكانوا يحرجون بذلك. (تبيين الحقائق: ٥/٧٦، كتاب الوديعة، ملتان)

الوديعة أمانة في يد الوديع فإذا هلكت بلا تعد من المستودع وبدون صنعه وتقصيره فى الحفظ لا يلزم الضمان. (شرح المجلة، لمحمد خالد الاتاسى: ٣/٢٤٢، المادة: ٧٧٧)

Allāh ta'ālā knows best.

When charity money is confiscated

Question

A person has been doing charitable work for a long time in India. He lives in England or South Africa. Many people give him their zakāh and lillāh amounts. Some people give him some monies as a trust. Before he can go to India, he sends the money over from England or South Africa. One of his associates receives the money in India and stores it in a safe place. This is done for the sake of safekeeping. A few weeks ago, the police – acting under certain suspicions – searched his house. They arrested the associate and confiscated all the money. Is the person who sent the money liable? Is it necessary for those who gave zakāh amounts to repay their zakāh?

Answer

When something is entrusted to a person, he has to make all efforts to safeguard and protect it. If the item is destroyed or damaged without committing an excess, carelessness and laziness; then the entrusted person is not liable to pay back anything. If he was found wanting in the way he safeguarded it or committed an excess in this regard, he will be liable. Similarly, if someone appointed a person as a representative to convey an item, the ruling is the same as for an entrusted person. If the item is destroyed while under the representative and without any shortcoming from his side, he will not be liable to pay any compensation.

الدر المختار:

الإيداع شرعاً تسليط الغير على حفظ ماله صريحاً أو دلالة... وهي أمانة، هذا حكمها مع وجوب الحفظ والأداء عند الطلب، واستحباب قبولها، فلا تضمن بالهلاک. (الدر المختار: ٥/٦٦٤، سعيد)

وأما حكمها فوجوب الحفظ على المودع، وصيرورة المال أمانة في يده، ووجوب أدائه عند طلب مالكه. (الفتاوى الهندية: ٤/٣٣٨)

بدائع الصنائع:

إن المبيع أمانة في يد الموكل، ألا ترى أنه لو هلک في يده فالهلاک على الموكل. (بدائع الصنائع: ٦/٣٧، سعيد)

الفتاوى الهندية:

فهو - أى الوكيل - مصدق، لأنه أمين، كذا في محيط السرخسي في باب الوكيل مع الموكل إذا اختلفا. (الفتاوى الهندية: ٣/٦٤٤)

When a person appoints another as a representative to pay zakāh on his behalf, and the poor are specified and known – they are given the zakāh every year – then once the representative takes possession of the zakāh, it will be fulfilled [on behalf of those who had given it to him]. If the money is destroyed in any way while being with the representative, it will not be necessary to pay the zakāh a second time.

This is what is gauged from the verdicts of our seniors. The madrasah authorities and their collectors fall under the category of ʿāmilīn-e-sadaqah (those employed over the collection and distribution of zakāh) and become the representatives of the poor. They are representatives of the donors [those who gave the zakāh] only to the extent that they have accepted them as representatives of the poor, and therefore handed over their money to them. When the person takes possession of the money as a representative, it will be referred to as a legal possession by the poor.[1]

Tadhkiratur Rashīd:

The principal of a madrasah is a representative of all the students...when someone gives something to the principal, his taking possession of it is synonymous to the students taking possession of it. Once he takes possession of it, ownership of it has left the person who gave the thing and enters the ownership of the students.[2]

قال فى الدر المختار مع رد المحتار: (لا يخرج عن العهدة)... بخلاف ما إذا ضاعت في يد الساعي، لأن يده كيد الفقراء. (الدر المختار مع رد المحتار: ٢/٢٧٠، سعيد)

If the recipients of zakāh are unspecified and unknown, and the representative spends the zakāh money according to his discretion, the zakāh of those who gave it has not been fulfilled. It is necessary for them to pay the zakāh again.

قال فى الدر المختار: ولا يخرج عن العهدة بالعزل، بل بالأداء للفقراء. وفى الشامية:

(لا يخرج عن العهدة) فلو ضاعت لا تسقط عنہ الزكاة، ولو مات كان ميراثاً عنہ، بخلاف ما إذا ضاعت في يد الساعي، لأن يده كيد الفقراء. (الدر المختار مع رد المحتار: ٢/٢٧٠، سعيد)

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[1] Refer to *Imdād al-Muftīyyīn*, vol. 2, p. 1085.

[2] *Tadhkiratur Rashīd*, p. 164; *Imdād al-Fatāwā*, vol. 3, p. 316; *Niẕām al-Fatāwā*, p. 446; *Fatāwā Maẖmūdīyyah*, vol. 9, p. 506; *Jadīd Fiqhī Masā'il*, vol. 1, p. 227.

خلاصة الفتاوىٰ:

رجل عزل زكاة ماله ووضعها في ناحية بيته، فسرقها سارق لا يقطع يده للشبهة وعليه أن يزكيها. (خلاصة الفتاوىٰ: ١/٢٣٨)

Further reading: *Fatāwā Mahmūdīyyah*, vol. 9, p. 480; *Kifāyatul Muftī*, vol. 4, p. 297; *Fatāwā Farīdīyyah*, vol. 3, p. 275.

Allāh taʿālā knows best.

When the entire tax amount is not paid to the government

Question

Quite often, businessmen collect taxes from their customers but do not pay the full amount to the government. Is this tax classified as an amānat? Is it necessary to convey it in full?

Answer

When businessmen collect tax from their customers, they are representatives on behalf of the government, and the tax amount is a trust with them. It is necessary to pay it to the government. If not, it will amount to treachery. Allāh taʿālā says:

يٰأَيُّهَا الَّذِيْنَ اٰمَنُوْا لَا تَخُوْنُوا اللهَ وَالرَّسُوْلَ وَتَخُوْنُوْآ أَمٰنٰتِكُمْ وَأَنْتُمْ تَعْلَمُوْنَ.

> O believers! Do not betray Allāh and the Messenger, and do not wilfully betray your mutual trusts.[1]

وأما صفتها أى صفة الوكالة فإنها من العقود الجائزة الغير اللازمة... ومنه أنه أمين فيما في يده كالمودع. (الفتاوى الهندية: ٣/٥٦٧)

Allāh taʿālā knows best.

[1] Sūrah al-Anfāl, 8: 27.

GIFTS AND DONATIONS

A pre-conditioned permission to install an ATM

Question

A Muslim is running a petrol station. The property belongs to the petroleum company and the man took it on rent. A bank wants to install an ATM in the petrol station. People will deposit and withdraw money from it. The bank has laid down the condition that the one running the petrol station will not receive any benefits for the first three thousand transactions of the ATM in a month. Once the number three thousand is reached, he will receive seventy-five cents for every transaction. Is an agreement of this nature permissible?

Answer

An agreement of this nature appears to be valid due to the following two reasons:

1. It is classified as tabarruʿ mashrūṯ (a pre-conditioned donation). This refers to the laying down of a condition for a favour. For example, the permission for free usage of three thousand transactions is a tabarruʿ. It is then pre-conditioned with a rental agreement that any number above three thousand will be paid as rent by the bank. This becomes a tabarruʿ mashrūṯ. This agreement is therefore permissible and valid.

2. It is classified as an ijārah – a rental contract. A condition has been laid down in it. However, because it is accepted as a societal norm and it does not lead to dispute, the condition does not invalidate the agreement.

إلا أن يكون متعارفاً لأن العرف قاضٍ على القياس. (الهداية: ٣/٥٩، باب البيع الفاسد)

Additional details can be found in Kitāb al-Ijārah.

Observe the following proofs for tabarruʿ mashrūṯ:

عن أنس رضي الله عنه أن جاراً لرسول الله صلى الله عليه وسلم فارسياً كان طيب المرق فصنع لرسول الله صلى الله عليه وسلم ثم جاء يدعوه، فقال: وهذه لعائشة رضى الله تعالىٰ عنها فقال: لا، فقال رسول الله صلى الله عليه وسلم:

لا، فعاد يدعوه، فقال رسول الله صلى الله عليه وسلم:وهذه، قال: لا، قال رسول الله صلى الله عليه وسلم: لا، ثم عاد يدعوه، فقال رسول الله صلى الله عليه وسلم: وهذه، قال: نعم فى الثالثة، فقاما يتدافعان حتى أتيا منزله. (رواه مسلم: ١٧٦/٢)

The gist of the above Hadīth: A person invited Rasūlullāh sallallāhu ʿalayhi wa sallam to a meal. Rasūlullāh sallallāhu ʿalayhi wa sallam laid down the condition that Hadrat ʿĀ'ishah radiyallāhu ʿanhā should also be included. The man declined. He eventually acquiesced when Rasūlullāh sallallāhu ʿalayhi wa sallam asked him a third time. Rasūlullāh sallallāhu ʿalayhi wa sallam then brought Hadrat ʿĀ'ishah radiyallāhu ʿanhā with him.

Hadrat Abū Bakr radiyallāhu ʿanhu bought a palanquin for a camel from Hadrat ʿĀzib radiyallāhu ʿanhu and said to him: "Tell your son, Barrā', to take this palanquin for me." Hadrat ʿĀzib radiyallāhu ʿanhu said: "He will take it on condition you relate the story of the Hijrah." Hadrat ʿĀzib radiyallāhu ʿanhu preconditioned the favour of carrying the palanquin with relating the story of the Hijrah, and Hadrat Abū Bakr radiyallāhu ʿanhu accepted the condition of relating the story.

عن البراء رضي الله عنه قال: اشترى أبو بكر رضي الله عنه من عازب رضي الله عنه رحلاً بثلاثة عشر درهماً، فقال أبو بكر رضي الله عنه لعازب رضي الله عنه: مر البراء فليحمل إلي رحلي، فقال عازب رضي الله عنه لا، حتى تحدثنا كيف صنعت أنت و رسول الله صلى الله عليه وسلم حين خرجتما من مكة. (رواه البخارى: ٥١٥/١، مناقب المهاجرين)

We deduce from both these Ahādīth that tabarruʿ mashrūt is permissible. Tabarruʿ mashrūt means laying down a condition in a favour, or laying down a condition for one's own benefit in a transaction. It is the same scenario in the case under question. The bank made a request to install an ATM. The owner of the petrol station said: "Very well. I give you free permission, but after the first three thousand transactions, you will have to give me seventy-five cents for each transaction. The bank accepts the condition. This agreement is permissible.

Further reading: *Imdād al-Ahkām*, vol. 3, p. 386, 606.

Allāh taʿālā knows best.

A prize for monthly subscribers

Question

The *Readers Digest* is a monthly periodical. The names of those who subscribe to it are included in a lot. The one whose name is drawn receives a prize. Is this permissible? If a person's name is drawn, is it permissible for him to accept the prize?

Answer

If a person bought the periodical and the publishers said that the one whose name is drawn will receive a certain prize, then there is nothing wrong in this. In fact, it is classified as tabarruʿ mashrūṯ. In other words, we will do a favour to those who buy the *Readers Digest*. It will be pre-conditioned by the drawing of a lot. This is similar to admitting a student with the pre-condition of paying fees. There is no gambling in this lot. The drawing of a lot which contains the element of gambling means that some of those who are eligible will be deprived while other eligible people will receive something. In this case, there is no one who is eligible. Each person is eligible for the periodical in return for the money which he paid for it, and he has received the periodical.

Imdād al-Aẖkām:

The gist of a question is: A company makes an agreement with a retail business: "If you buy goods to the value of ten thousand from our company, you will receive three hundred rupees as a discount. But if you buy from any other company which is similar to ours, even once, you will not get this discount." Is it permissible to lay down this condition?

Answer: This agreement is permissible because the commission which the buyer receives at the end of the year is a donation from the seller. The right of the buyer is not critical, and it is permissible to precondition a donation.[1]

The following is stated in another place:

Question: Is it permissible to collect admission fees and monthly fees from students of madāris?

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[1] *Imdād al-Aẖkām*, vol. 3, p. 386.

Answer: It is permissible because it is not a wage but a donation, and it is permissible to lay down a condition in a donation. It does not entail compulsion because if a student does not accept the condition, he has the right of not admitting himself into the madrasah.

ودليله أنه صلى الله عليه وسلم قال لمن أضافه وعائشة رضى الله تعالىٰ عنها قال: لا، قال: فلا إذن حتى قال فى الثالثة: وعائشة رضى الله تعالىٰ عنها، قال: نعم. (امداد الاحكام: ٦٠٦/٣)

The meaning of this Hadīth is that a person wanted to invite Rasūlullāh sallallāhu ʿalayhi wa sallam to a meal. Rasūlullāh sallallāhu ʿalayhi wa sallam laid down the condition of bringing Hadrat ʿĀ'ishah radiyallāhu ʿanhā with. The host declined initially but agreed to it on the third occasion. Rasūlullāh sallallāhu ʿalayhi wa sallam going to the person's house was a tabarruʿ which was preconditioned with taking Hadrat ʿĀ'ishah radiyallāhu ʿanhā.

Imdād al-Ahkām is a collection of fatāwā by Hadrat Maulānā Zafar Ahmad Thānwī rahimahullāh compiled under the supervision of Hadrat Maulānā Ashraf ʿAlī Thānwī rahimahullāh.

Hadrat Maulānā Muftī ʿAbd ash-Shakūr Tirmidhī Sāhib rahimahullāh wrote an article in the monthly *al-Balāgh* dated Jumādā al-Ūlā 1432 A.H. In it he writes:...In reality, *Imdād al-Ahkām* is an addendum to Hadrat Thānwī's *Imdād al-Fatāwā*...(*al-Balāgh*, p. 40)

If there is no other defect in the above agreement, there will be nothing wrong in doing this.

Allāh taʿālā knows best.

When an invitation is pre-conditioned with a donation

Question

When certain organizations are in need of money and their expenses are too high, they extend an invitation to a meal. They charge an extra amount of money to those who come. The money which is left over is then used for the organization's expenses. Is it permissible to take the extra amount and then use it?

Answer

The invitation to the meal is essentially a tabarruʿ from the organization. The extra amount is charged without compelling anyone. The one who does not want to fulfil the condition has the

choice of not attending. This agreement will be classified as a tabarruʿ mashrūṯ and is permissible.

References were provided previously.

Allāh taʿālā knows best.

Pre-conditioned gifts in a walīmah

Question

The following custom is observed in walīmahs and other similar functions: People bring gifts and, at the end of the function, the person who hosted the function makes an assessment of all the gifts and makes a note of them with the intention that when he is invited, this is how much he will have to give. Those who gave the gifts have it in their minds that when it is their turn, this is how much they ought to receive. Is it permissible to give and accept gifts in this way?

Answer

This is a tabarruʿ mashrūṯ. If the quality or nature of the item is inferior, it leads to unhappiness and backbiting. This custom is disastrous for poor people. It is necessary to abstain from it. Allāh taʿālā says:

وَمَا آتَيْتُمْ مِّنْ رِبًا لِّيَرْبُوَ فِي أَمْوَالِ النَّاسِ فَلَا يَرْبُوْ عِنْدَ اللهِ.

> Whatever you give in usury in order that it may increase in the wealth of people – it does not increase in the sight of Allāh.[1]

Some exegists explain this verse as follows: If a person gives anything to someone else with this in mind that the latter will return the favour with a greater favour, then this giving of his will earn him no blessing and reward in the sight of Allāh taʿālā even though it is permissible to do this. (*Tafsīr ʿUthmānī*)

This explanation is quoted from Hadrat ʿAbdullāh ibn ʿAbbās radiyallāhu ʿanhu and Imām Shāfiʿī rahimahullāh in *Maʿārif al-Qur'ān* of Maulānā Idrīs Kāndhlawī rahimahullāh, vol. 6, p. 158.

Islāh ar-Rusūm:

Hadrat Thānwī writes:

[1] Sūrah ar-Rūm, 30: 39.

This is like a pre-conditioned loan: If you give money in his meal function, he will give money in your meal function. Although they will not say it verbally, it falls under the principle "a prevailing custom is like a pre-condition". And this is not correct.

However, we learn from *Imdād al-Ahkām* that a transaction like this is tabarruʿ mashrūt.

Although tabarruʿ mashrūt is permissible, one should abstain from it because of its many harms and evils.

Allāh taʿālā knows best.

An issue related to a pre-conditioned donation

Question

Certain airlines have this advertisement: The one who earns a certain amount of miles with us will receive a free ticket or certain discounts. Is it permissible to accept them?

Answer

This is classified as tabarruʿ mashrūt and permissible. This is similar to madrasah authorities pre-conditioning fees for admission. Hadrat Maulānā Zafar Ahmad Thānwī rahimahullāh says it is permissible. Details were provided previously.

Allāh taʿālā knows best.

A joint grant

Question

While Zayd was in his senses and fully aware of his actions, he gave his land to his four brothers. It is now in their possession. However, he did not divide the land into separate portions when giving it to them. Zayd has passed on and his sisters are now demanding their share of the land. Is their demand valid?

Answer

The jurists in general state that according to Imām Abū Hanīfah rahimahullāh a joint grant (hibah mushāʿ) is not permissible. It has to be divided and given. Hibah mushāʿ refers to giving one portion of a whole. This issue is clearly mentioned in the books of jurisprudence, there is no need to provide references. Nonetheless, it needs to be reviewed because hibah mushāʿ has become quite common nowadays. Apart from Islamic law, other laws consider this type of gifting to be correct and complete. The jurists state that when general societal

norms are in conflict with the text of the jurists, general and specific societal norms will be given preference. I am therefore of the view that this grant ought to be executed. Yes, it is necessary to give possession over the gifted item. Taking possession is necessary according to Imām Abū Hanīfah, Imām Shāfi'ī and Imām Ahmad rahimahumullāh. There will be possession in hibah mushā', but it will be defective; it will be incomplete.

The books of jurisprudence state that a partner cannot be a paid employee. In other words, if two brothers are partners in a business, then it is not permissible to specify a wage for one brother in addition to the profits of his share. However, after a lengthy investigation, Hadrat Muftī Rashīd Ahmad Sāhib rahimahullāh writes: The text of the madh-hab is left aside even on account of specific practice. Nowadays, it is common practice for companies to hire partners as paid employees. Therefore, there is more reason for leaving aside the text of the madh-hab.[1]

He writes before the above:

Common practice is a pre-requisite for leaving aside a text of the Sharī'ah. However, even a specific practice will be sufficient reason to leave aside a text of the madh-hab.[2]

Observe the following attestations:

Jurists of the past included the statement سرحتك as a written divorce and classified it as a talāq-e-bā'in. However, latter day jurists – due to societal norms – classified it as an explicit divorce, and issued the fatwā of a revocable divorce without having made such an intention.

Imām Abū Hanīfah rahimahullāh considers a compulsion to be one only when it is done by a sultan. Imām Muhammad rahimahullāh is of the view that it is classified as a compulsion even when done by a non-sultan.

The jurists say that it is impermissible to hire out books. Some jurists – due to societal norms – permit it. This was explained previously.

The fatwā of tadmīn as-sā'ī and tadmīn ajīr mushtarak was issued on the basis of societal norms.

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[1] *Ahsan al-Fatāwā*, vol. 7, p 328.

[2] Ibid.

In short, an explicit Hadīth cannot be left aside in favour of general and specific societal norms. Yes, qiyās can be given up for general societal norms. For example, the narration on qafīz at-tahhān (dry measure of a miller) cannot be cast aside because of general societal norms. However, other issues which stem from it on the basis of qiyās are permissible. For example, a commission agent who works on a percentage. This is why the jurists of Balkh say it is permissible to take a payment on a percentage basis. In other words, a person sews a garment, and takes half or quarter payment. It will be permissible on the basis of general societal norms even though ʿAllāmah Shāmī rahimahullāh is hesitant in classifying it as a general societal norm. (In our times, this has become so common that there is no doubt whatsoever about it being a general societal norm.)

However, the explicit text of the madh-hab or the zāhir ar-riwāyah can be cast aside because of general societal norms which are prevalent in all cities, and specific societal norms in specific cities.

This issue is explained in *Sharh ʿUqūd Rasm al-Muftī* and *Nashr al-ʿUrf* of ʿAllāmah Shāmī rahimahullāh, and other books. Therefore, if possession is given over a joint gift without dividing it first – and this has become a general societal norm, as is the case today; and is also the law – then this gift will have to be accepted. It is probably for this reason that ʿAllāmah Anwar Shāh Kashmīrī rahimahullāh stated in *Fayd al-Bārī*:

ثم اعلم أن هبة المشاع لا تتم في أصل المذهب وإن تحقق القبض أيضاً وأفتى المتأخرون بجوازها وبه أفتى وذلك لأني أتردد في نفس مسألة الشيوع فلست أشدد فيها كالحنفية ولا أوسع فيها كالبخاري بل هي أمر بين الأمرين كما علمت، فإن مرضى الشرع وهو رفع الإبهام والتمييز، والشيوع يخل به، فلا يكون هدراً، كما أهدره البخاري، ولا ضرورياً،كما فهمه الحنفية، بحيث قالوا ببطلان الهبة، وبالجملة إذا كان حال الشيوع عندي ما سمعت، فلم أشدد فى الحكم ووافقت المتأخرين في جواز هبة المشاع عند القبض. (فيض البارى: ٣/٣٧٥، كتاب الهبة)

The great and erudite jurist of the past, ʿAllāmah Shams al-A’immah Sarakhsī rahimahullāh writes:

وبالإجماع هبة المشاع فيما لا يحتمل القسمة تتم بالقبض وكذلك عندى فيما يحتمل القسمة جائز. (المبسوط للامام السرخسى:٢١/٦٩، ط: ادارة القرآن)

ʿAllāmah Sarakhsī rahimahullāh first writes this in Kitāb al-Hibah and then in Kitāb ar-Rehn.

It is essential that there must be no dispute. If it causes a dispute – as regards who is going to take which portion – then it will be incorrect.

والذي أراه أن النهي عنه لكونه مفضياً إلى النزاع، وكل أمر يكون النهي عنه كذلك لا يشدد فيه الشارع بنفسه، بل ربما يغمض عنه أيضاً، فلا ينبغى التشدد فيه، ويدل عليه ما أخرجه البخاري...وفيه فقال رسول الله صلى الله عليه وسلم لما كثرت عنده الخصومة في ذلك: فإما لا، فلا تبتاعوا حتى يبدو صلاح الثمر، كالمشورة يشيربها، لكثرة خصومتهم. (فيض البارى: ٣/٣٧٢)

Allāh taʿālā knows best.

A minor taking possession of a grant

Question

Honourable Muftī Sāhib. My father passed away a few days back. Seven months before he died, he said: "Whatever I own here in Africa belongs to my youngest son, Husayn." I, my wife and my brother-in-law ʿAbdullāh are witnesses to this statement.

My question is: Will the grant be complete by this statement? There is no paper-work in this regard. Bear in mind that we – the remaining brothers and sisters – have no objection to it.

Answer

Your father's statement: "Whatever I own here in Africa belongs to my youngest son, Husayn," is a gift. When your father gave over something to his minor son, his mere statement suffices. There is no need for him to take possession of it or for any other paper-work. This is because a father is himself a guardian over his minor child. When a father takes possession, it is synonymous to the minor children taking possession. The grant is therefore complete.

بدائع الصنائع

ولو نحل ابنه الصغير شيئاً جاز ويصير قابضاً له مع العقد كما إذا باع ماله منه حتى لو هلك عقيب البيع يهلك من مال الابن لصيرورته قابضاً للصغير مع العقد وينبغي للرجل أن يعدل بين أولاده فى النحل لقوله سبحانه وتعالىٰ: "إن الله يأمر بالعدل والإحسان." (بدائع الصنائع فى ترتيب الشرائع: ٦/١٢٧، شرائط الهبة، منها القبض، سعيد)

(وكذا فى الفتاوى الهندية: ٤/٣٩١، الباب السادس فى الهبة للصغير)

الدر المختار

وهبة من له ولاية على الطفل فى الجملة تتم بالعقد أى بالإيجاب فقط، كما يشير إليه الشارح كذا فى الهامش وهذا إذا أعلمه أو أشهد عليه والإشهاد للتحرز عن الجحود بعد موته والإعلام لازم لأنه بمنزلة القبض، بزازية، قال فى التاتارخانية: فلو أرسل العبد في حاجة أو كان آبقاً في دار الإسلام فوهبه من ابنه صحت، فلو لم يرجع العبد حتى مات الأب لا يصير ميراثاً عن الأب، قوله لو الموهوب معلوماً، قال محمد: كل شيء وهبه لابنه الصغير و أشهد عليه وذلك الشيء معلوم في نفسه فهو جائز والقصد أن يعلم ما وهبه له والإشهاد ليس بشرط لازم لأن الهبة تتم بالإعلام تاتارخانية، قوله وكان في يده أو في يد مودعه لأن قبض الولي ينوب عنه والأصل أن كل عقد يتولاه الواحد يكتفى فيه بالإيجاب.- (الدر المختار مع فتاوى الشامى: ٥/٦٩٤، كتاب الهبة، سعيد)

وفى التحرير المختار: قال الرحمتى: وهل يشترط أن يكون محوزاً مقسوماً كما هو الشرط فى الهبة أو يقال إنما شرط ذلك لأجل تمام القبض وهو مقبوض لولي القبض فلا يفتقر لذلك. (تقريرات الرافعى على رد المحتار: ٥/٢٥٢، كتاب الهبة، سعيد)

Ahsan al-Fatāwā:

The gist of the question is: A minor is given some gold and silver. Does he become its owner by making an intention in this regard or is it necessary for him to take possession of it? If taking possession is necessary, how will this be done?

Answer: If a person gives a gift to minor children, then the father taking possession of it will suffice for it to be included in the minors' ownership.[1]

Majmūʿah Qawānīn Islāmī:

The father, legal guardian or testator of a minor acquired some wealth or property and said: "I acquired it for such and such minor." His mere saying this will be a grant in favour of the minor.[2]

Allāh taʿālā knows best.

A conditional gift

Question

Is a conditional gift valid? For example, a person says: "If I get married in this month, this book will be a gift to you."

Answer

A conditional gift is invalid.

ثانيها أن كل ما كان من التمليكات أو التقييدات كرجعة يبطل تعليقه بالشرط. وقال الشامي: قوله من التمليكات كبيع وإجارة واستئجار وهبة. (الدر المختار مع فتاوى الشامى: ٥/٢٤١، سعيد)

البحرالرائق

وفى البزازية من البيوع وتعليق الهبة بـ"إن" باطل وبـ "على" إن ملائماً كهبته على أن يعوضه يجوز وإن مخالفاً بطل الشرط وصحت الهبة. (البحر الرائق: ٦/١٩١، كوئته)

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1 *Ahsan al-Fatāwā*, vol. 7, p. 258.

2 *Majmūʿah Qawānīn Islāmī*, p. 242.

حاشية الطحطاوى

قوله و يصح تعليق ہبة أى بشرط ملائم إن كان بـ"على" لا بـ"إن" قال فى البزازية من البيوع...الخ. (حاشية الطحطاوى على الدر المختار: ٣/١٣٦، باب المتفرقات، كوئٹہ)

فتاوى سراجيہ

رجل قال لآخر: إن كان كذا فقد وہبت مالي منك لم يصح. (الفتاوى السراجية، ص ٤٠٦، كتاب الهبة باب الهبة الجائزة والفاسدة)

وفي شرح المجلة: قال: والظاہر أن الفساد لكونہ تعليق الهبة بالخطر. (شرح المجلة لمحمد الاتاسى: ٣/٣٧١، كتاب الهبة)

وللاستزادة انظر: (تكملة رد المحتار: ٨/٤٢٧، كتاب الهبة، سعيد. والفتاوى الهندية: ٤/٣٩٧)

In short, if the pre-condition is suitable then the condition with على is valid, but not with إنّ. However, 'Allāmah Shāmī ra<u>h</u>imahullāh has quoted an uncommon opinion which states that a condition with إنّ is also valid.

لكن فى البحر أيضاً عن المناقب عن الناصحي: لو قال: إن اشتريت جارية فقد ملكتها منك يصح، ومعناه إذا قبضہ بناء على ذلك، أى إذا قبض الموہوب لہ الموہوب بناء على التمليك يصح مع أنہ معلق بـ"إن" وہو خلاف ما فى البزازية من إطلاق بطلانہ، ولعلہ قول آخر يجعل التعليق بالملائم صحيحاً كالتقييد تأمل. (فتاوى الشامى: ٥/٢٥٥، سعيد)

However, the more popular view is that a condition with إنّ is invalid. This view is supported by the ruling related to raqbā,[1] which, according to Imām Abū Hanīfah and Imām Muhammad rahimahumallāh is invalid.

و ہو أن يقول: أراقب موتک فراقب موتي فإن متُ فهي لک وإن متَ فهي لي فيكون ہذا تعليق التمليک بالخطر و ہو موت المملک قبلہ وذلک باطل. (مبسوط للامام السرخسى: ١٢/٨٩، باب الرقبى، ادارة القرآن)

Allāh taʿālā knows best.

Gifting a lost item

Question

A person lost his watch. He said to Zayd: "If you find the watch, it is yours." He searched for the watch and found it. The owner of the watch now regrets his offer. Has the watch entered Zayd's ownership?

Answer

Ownership of the watch is not established in favour of Zayd. Rather, it continues to be in the original owner's ownership.

رجل أضل لؤلؤة فوہبها لآخر وسلطہ على طلبها وقبضها متى وجدہا قال أبو يوسف: ہذه ہبة فاسد، لأنها ہبة على خطر، والهبة لا تصح مع الخطر، وقال زفر: تجوز ہذه الهبة. (فتاوىٰ قاضيخان على ہامش الهندية: ٣/٣٨١)

رجل سقطت منہ لؤلؤة فوہبها من رجل وسلطہ على الطلب والقبض فطلبها وقبضها فالهبة باطلة، لأن في قيامها وقت الطلب خطراً، والهبة تبطل بالأخطار. (الفتاوىٰ السراجية، كتاب الهبة، باب الهبة الجائزة والفاسدة، ص ٤٠٥)

[1] A person says to another: "If I die first, the item is yours. If you die first, it is mine." This is invalid.

وللاستزادة انظر: (فتاوى الشامى: ٥/٦٨٨، كتاب الهبة، سعيد. والفتاوى الهندية: ٤/٣٨١. ومجمع الضمانات: ٢/٧١٤. ودرر الحكام فى شرح مجلة الاحكام: ٢/٣٨٥، المادة: ٦٥٨)

Allāh ta'ālā knows best.

A shawl which is given in an aeroplane

Question

Airlines normally give a shawl which is used while in the aeroplane. Is it permissible for a person to take the shawl after obtaining permission from an air hostess?

Answer

It is not permissible to take it after obtaining permission from an air hostess because it does not belong to her. The actual owner is someone else. Furthermore, it is written on the shawl that it has to be returned after using it.

ومنها (شرائط الهبة) أن يكون مملوكاً للواهب فلا تجوز هبة مال الغير بغير إذنه لاستحالة تمليك ما ليس بمملوك للواهب كذا فى البدائع. (الفتاوى الهندية: ٤/٣٧٤)

Allāh ta'ālā knows best.

Gifting a Qur'ān to a non-Muslim

Question

Is it permissible to give a Qur'ān as a gift to a non-Muslim?

Answer

If the non-Muslim has respect for the Qur'ān and you are convinced that he will not show disrespect to it, then it is permissible to give it to him. He may well be guided. However, if there is the possibility of the opposite, then it is not permissible to give it to him.

عن عبد الله بن عمر رضي الله عنه عن النبي صلى الله عليه وسلم أنه كان ينهى أن يسافر بالقرآن إلى أرض العدو مخافة أن يناله العدو. (رواه مسلم:

۲/۱۳۱، باب النہی ان یسافر بالمصحف الی ارض الکفار اذا خیف وقوعہ بایدیہم)

نفع المفتی والسائل

الاستفسار: ہل یجوز السفر إلی أرض العدو مع المصحف؟

الاستبشار: من سافر إلی أرض العدو لیس لہ أن یخرج المصاحف إلا في جیش یؤمن علیہم من استیلاء الکفار. قال فی التبیین شرح الکنز: لما فیہ من تعریض المصحف علی الاستخفاف، وہو المراد من قول النبي صلی اللہ علیہ وعلی آلہ وسلم: لا تسافروا بالقرآن في أرض العدو. وذکر الطحاوي أن ہذا النہي کان في ابتداء الإسلام حیث کانت المصاحف قلیلۃ، والقراء قلیلین، فیخاف ذہاب بعض القرآن، وانتسخ ذلک حین کثرتہم، والأول أصح وأحوط، کذا في کشف الوقایۃ. (نفع المفتی والسائل، ص ٤٣٦، ما یتعلق بقراءۃ القرآن وسجدۃ التلاوۃ والمصاحف)

Fatāwā Rahīmīyyah:

If the non-Muslim has respect for the Qur'ān and you are convinced that he will not show disrespect to it, then it is permissible to give it to him. He may well be guided. At the same time, he should be advised that it is the sanctified speech of Allāh ta'ālā and as such, it should not be touched while in a state of impurity. If he is in a state of impurity, he must perform ghusl or wuḏū', and then study it. He must be taught how to perform ghusl and wuḏū'. Allāh willing, this will create reverence in his heart for the Qur'ān.

ویمنع النصراني (وفي بعض النسخ الکافر) من مسہ وجوزہ محمد إذا اغتسل ولا بأس بتعلیمہ القرآن والفقہ عسی یہتدی.[1]

A non-Muslim is not liable to carry out good actions. At the same time, it is our duty to protect the Qur'ān from disrespect.

[1] *Fatāwā Rahīmīyyah*, vol. 6, p. 283.

Allāh ta'ālā knows best.

Giving a pig-skin leather jacket to a non-Muslim

<u>Question</u>

A man bought a jacket. Later on he learnt that it is made of pig skin. Can he give it to a non-Muslim?

<u>Answer</u>

All parts of a pig are intrinsically impure; it is not permissible to use any part of it. A leather jacket made of pig skin is therefore prohibited to Muslims. If a Muslim buys one, he must return it and obtain a refund. If it is not possible to return it – for whatever reason – he may give it to a non-Muslim without the intention of a reward. It is not permissible to give to a Muslim something which is harām.

Fatāwā Bayyināt:

Question: Leather shoes and other leather goods come to our country from China, Spain and other countries. Pig-skin is used in their manufacture. Some shoes are made of faux-leather but they are lined with pig-skin. Other shoes are made entirely with pig-skin. Is it harām to wear these shoes? Is it harām to sell them? If a trader bought millions worth of pig-skin shoes mistakenly, what should he do?

Answer: There is no doubt about a pig being intrinsically impure. The jurists state that it is unlawful to use any part of a pig, and to trade in it. The same rule will apply to items which contain pig skin or other pig parts. A transaction which involves a pig or any part of it is invalid. The money obtained from its sale is unlawful for the seller. In fact, the money does not even go into his ownership. Those who bought such goods by mistake must return them to the shopkeeper. The latter must then return them to the company from which he bought them. In this way, they will return the goods to those non-Muslims and take back the money which they paid.[1]

قال شيخنا: ويستفاد من كتب فقهائنا كالهدایm وغيرها أن من ملك بملك خبيث ولم يمكنه الرد إلى المالك فسبيله التصدق على الفقراء، قال: ومثله يقول ابن القيم في "بدائع الفوائد"، ...قال: والظاهر أن المتصدق بمثله ينبغي أن

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[1] *Fatāwā Bayyināt*, vol. 4, pp. 470-471.

ينوي به فراغ ذمته ولا يرجو به المثوبة، نعم يرجوها بالعمل بأمر الشارع، وكيف يرجو الثواب بمال حرام ويكفيه أن يخلص منه كفافاً رأساً برأسٍ! ...وحديث ابن كليب أخرجه أبو داود في سننه (ص ٤٧٣) في (باب اجتناب الشبهات) من كتاب البيوع: عن عاصم بن كليب عن أبيه عن رجل من الأنصار قال: خرجنا مع رسول الله صلى الله عليه وسلم في جنازة... فلما رجع استقبله داعى امرأة، فجاء وجىء بالطعام فوضع يده، ثم وضع القوم فأكلوا فنظر آباؤنا رسول الله صلى الله عليه وسلم يلوك لقمة في فمه، ثم قال: "أجد لحم شاة أخذت بغير إذن أهلها" فأرسلت المرأة، قالت: يارسول الله! إنى أرسلت إلى البقيع يشتري لي شاة فلم أجد، فأرسلت إلى جار لي قد اشترى شاةً أن أرسل إلى بثمنها فلم يوجد، فأرسلت إلى امرأته، فأرسلت إلي بها، فقال رسول الله صلى الله عليه و سلم: أطعميه الأسارى اه، (رواه ابو داود: ٢/١١٧، باب اجتناب الشبهات من كتاب البيوع). رواه الدارقطني في سننه (في باب الصيد والذبائح: ٤/٢٨٦/٥٤). وفيه: فبينا هو يأكل إذ كف يده، وفيه أطعموها الأسارى، وفي طريق آخر: فلما أخذ رسول الله صلى الله عليه وسلم لقمته رمى بها.(في باب الصيد والذبائح: ٤/٢٨٦/٥٥). (معارف السنن: ١/٣٤، ٣٥، باب ما جاء لا تقبل صلاة بغير طهور،تحت قوله: ولا صدقة من غلول، سعيد)

Allāh ta'ālā knows best.

A charity or a gift when possession of it has not been taken

Question

In his house, a person has a small box in which he saves Lillāh money. He wants to make his obligatory or optional qurbānī from it. Can he do this?

Answer

An optional charity and a gift are not complete until the person to whom they are to be given takes possession of them. Therefore, as

long as he did not give it over to anyone, he may use it for himself. It will also be permissible to make obligatory or optional qurbānī with it.

شرح المجلة:

اعلم أن التمليك بلفظ الصدقة كالتمليك بلفظ الهبة من حيث أنها لا تصح إلا بالقبض. (شرح المجلة لمحمد خالد الاتاسى، ٣/٣٩٨)

تبيين الحقائق:

والصدقة كالهبة لا تصح إلا بالقبض ولا في مشاع يحتمل القسمة لأنه تبرع كالهبة ويلزم فيها ما يلزم فى الهبة فامتنعت بدون القبض كالهبة. (تبيين الحقائق: ٥/١٠٤)

الفتاوى الهندية:

الصدقة بمنزلة الهبة فى المشاع وغير المشاع وحاجتها إلى القبض. (الفتاوى الهندية: ٤/٤٠٦)

وللاستزادة انظر: (شرح العناية على الهداية: ٩/٥٦. والبحر الرائق: ٧/٢٩٧، كوئته. وفتح باب العناية: ٣/٣١٩. والاختيار لتعليل المختار: ٣/٦٦)

Yes, if the box belongs to a masjid or madrasah, and a person placed charity or Lillāh money in it, then – as per societal norms – it is synonymous to giving it over to the masjid or madrasah. Possession of the box is akin to a masjid trustee taking possession of it. The amount has therefore left the ownership of the donor. It is not correct for him to retract. For the same reason, it is not permissible for him to pay for his obligatory or optional qurbānī from this box.

ويظهر لي من مجموع هذه النقول أن الهبة كما تنعقد بالألفاظ الدالة على التمليك مجاناً لغة أو عرفاً، تنعقد أيضاً بالفعل بطريق التعاطي، لكن مع قرينة لفظية أو حالية، ومنها العرف والعادة، تعين أن ذلك الفعل أريد به التمليك. (شرح المجلة لمحمد خالد الاتاسى: ٣/٣٤٩)

Allāh taʿālā knows best.

Possession of a gift once possession of its documents takes place

Question

For the gifting of a land or shop, does it suffice to take possession of the title deeds or is it necessary to vacate the land or shop and then give it over to the donee?

Answer

When it comes to properties, possession of the title deeds and other official documents suffices to establish ownership. In other words, once the person takes possession of the documents, the gift will be complete.

وفى العقار ما يناسبه فقبض مفتاح الدار قبض لها. (حاشية الطحطاوى على الدر المختار:٣/٣٩٥)

إعطاء مفتاح العقار الذي له قفل للمشتري يكون تسليماً إذا تهيأ له فتحه من غير تكلفة،كما فى البحر ومثله فى الهندية والتاتارخانية وغيرهما، والظاهر أن المراد بتهيؤه فتحه من غير تكلف، أن يكون المفتاح مفتاح ذلک العقار، وهو معنى ما فى الخانية ونصها: ولو باع الدار وسلم المفتاح فقبض المفتاح ولم يذهب إلى الدار يكون قابضاً. (شرح المجلة، لمحمد الاتاسى، ٢/١٩٩، المادة: ٢٧١)

Jadīd Fiqhī Mabāhith:

Once a buyer receives the shares certificate, his possession of them will be established.[1]

As per societal norms, possession of shares is established once the buyer has the shares certificate. Furthermore, the manner of possession of every item is based on societal norms…Most people do not consider a possession to be valid if it is not proven with written documents.[2]

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[1] *Jadīd Fiqhī Mabāhith*, vol. 16, p. 19.

[2] *Jadīd Fiqhī Mabāhith*, vol. 16, p. 126.

Allāh taʿālā knows best.

A co-owned gift from a partner

Question

As per official documents, husband and wife are co-owners of a shop. The husband – on several occasions and in the presence of many people – said that he gave the shop to his wife and she is its owner. Although the husband goes to work in the shop, most of his work is outside the shop [not related to the shop]. Has the wife become the owner of the shop?

Answer

The husband's statement: "I gave the shop to my wife," is classified as a hibah – a gift. She enjoyed possession of it from even before this. The hibah is therefore complete and the wife has become the shop's owner. No matter whose name is mentioned on the official documents, this will not affect the Sharʿī hibah. Since the shop is by and large like an indivisible item, this hibah is valid without dividing it.

وفيما لا يقسم كالعبد والدابة والثوب والحمام يجوز هبة المشاع من الشريك وغيره في قولهم جميعاً. (فتاوىٰ قاضيخان على هامش الهندية: ٣/٢٦٧، كتاب الهبة)

وفى الفتاوى الهندية: وهبة المشاع فيما لا يحتمل القسمة تجوز من الشريك ومن الأجنبي كذا فى الفصول العمادية. (الفتاوى الهندية: ٤/٣٧٨، الباب الثانى فيما يجوز من الهبة وما لا يجوز)

(وكذا فى فتاوى الشامى: ٥/٦٩٢، سعيد. وبدائع الصنائع: ٦/١١٩، سعيد)

Fatāwā ʿUthmānī:

If a property is in the name of the donor merely on official documents, this does not affect the hibah in any way.[1]

Allāh taʿālā knows best.

[1] *Fatāwā ʿUthmānī*, vol. 3, p. 459.

Gifting items which belong to minors

Question

If a child has outgrown his clothes, can they be given in charity? Or is it necessary to estimate the value of the clothes and to then set aside that amount for the child, and then give the clothes as charity from one's own side?

Answer

Items which are purchased with the intention of the child's ownership belong to the child. Therefore, charity, gifting, etc. on behalf of the child will not be permissible. لأن الصبي لا يملك التبرع.

Yes, it will be permissible to estimate the value of the items, set aside that amount in the name of the child, and then give the items as gifts or charity on one's own behalf. If – as per societal norms – these items are given on loan to a child, then they can be given to others.

رجل اتخذ ثياباً لولده الصغير ثم أراد أن يدفع إلى ولد له آخر لم يكن له ذلك، لأنه لما اتخذ ثياباً لولده الأول صار ملكاً للأول بحكم العرف فلا يملك الدفع إلى غيره إلا إذا بين عند اتخاذه للأول أنه عارية فحينئذٍ يملكه لأن الدفع إلى الأول يحتمل الإعارة فإذا بين ذلك صح بيانه... ولا يجوز للأب أن يهب شيئاً من مال ولده الصغير بعوض وغير عوض لأنها تبرع ابتداءً. (فتاوىٰ قاضيخان على هامش الهندية: ٣/٢٧٩،٢٨٠، فصل فى هبة الوالد لولده والهبة للصغير)

وفى الفتاوى الهندية: رجل اتخذ لولده أو لتلميذه ثياباً ثم أراد أن يدفع إلى ولده الآخر أو تلميذه الآخر ليس له ذلك إلا أذا بين وقت الاتخاذ أنها عارية. (الفتاوى الهندية: ٤/٣٩٢). (وكذا فى الفتاوى الهندية: ٤/٤٠٠. والبحر الرائق: ٧/٢٨٨، كتاب الهبة. وجامع احكام الصغار المجلد الاول، فى مسائل الهبة)

وقال فى الدر المختار: اتخذ لولده أو لتلميذه ثياباً ثم أراد دفعها لغيره ليس له ذلك ما لم يبين وقت الاتخاذ أنها عارية - وفي تكملة رد المحتار: قوله اتخذ لولده أى الصغير وأما الكبير فلا بد من التسليم،... وفى البزازية اتخذ لولده

الصغير ثياباً يملكها، وكذا الكبير بالتسليم... قوله ما لم يبين قال فى البحر: وإن أراد الاحتياط يبين أنها عارية حتى يمكنه أن يدفع إلى غيره، وفى الحاوى الزاهدي برمز بم دفع لولده الصغير قرضاً فأكل نصفه ثم أخذه منه ودفعه لآخر يضمن إذا كان دفعه لولده على وجه التمليك، وإذا دفعه على وجه الإباحة لا يضمن قال عرف به أن مجرد الدفع من الأب إلى الصغير لا يكون تمليكاً وأنه حسن. (الدر المختار مع تكملة رد المحتار: ٨/٤٥٣، سعيد)

وفى الشامية ايضاً فى باب القرض: قال فى الهداية: فإن تأجيله لا يصح لأنه إعارة وصلة فى الابتداء حتى يصح بلفظ الإعارة ولا يملكه من لا يملك التبرع كالوصي والصبي. (فتاوى الشامى: ٤/١٧، سعيد)

Hadrat Thānwī rahimahullāh states:

Clothes, shoes and other items which are normally made for children should – as a precaution – not be given over to the children's ownership. Rather, keep it in one's own ownership so that if one child outgrows a garment, the next can be made to wear it. If the child is made the owner of the garment, then it is not permissible even for the father to give it to another child to wear.[1]

Hadrat Muftī Shafī' Sāhib rahimahullāh also wrote in a similar vein.[2]

Allāh ta'ālā knows best.

Gifting insignificant items on behalf of minors

Question

If these items [old clothes] have no real value, can they be given in charity with the intention of conveying rewards to the child?

Answer

The pure Sharī'ah certainly does not disregard the well-being and welfare of minors. Instead, it gives preference to their welfare and their benefits. This is why a guardian cannot donate items which

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[1] *Majālis Hakīmul Ummat Ma'a Malfūzāt*, p. 72.

[2] *Majālis Muftī A'zam*, pp. 181-182.

belong to a minor. After all, it entails loss to the child. However, if a child owns certain items which have no real value, then there is nothing wrong at all in giving it in charity or for the conveying of rewards in favour of the child and for his benefit. Yes, if the item is quite valuable, it will not be permissible to give it away without paying the child for it.

وفي فوائد صاحب المحيط ذكر شمس الائمة في كتاب الوكالة للأب أن يعير ولده الصغير، وليس له أن يعير ماله قال: وتأويل هذا إذا كان ذلك في تعليم الحرفة بأن دفعه إلى أستاذ ليعلمه الحرفة ويخدم أستاذه أما إذا كان بخلاف ذلك لا يجوز. (جامع احكام الصغار للعلامة الاستروشنى: ١/١٧١، فى مسائل العارية)

وفيه أيضاً: لأن التصرف للصبي مقيد بالنظر. (جامع احكام الصغار للعلامة الاستروشنى: ١/٢١٥، فى مسائل الاجارات)

وفيه أيضاً: لو وهب داراً لابنه الصغير ثم اشترى بها داراً أخرى فالثانية لابنه الصغير أيضاً. (جامع احكام الصغار للعلامة الاستروشنى: ١/١٧٦، فى مسائل الهبة. وكذا فى الفتاوى الهندية: ٤/٣٩٢)

وقال أيضاً: إذا آجر الأب أو الجد أو وصيهما الصبي في عمل من الأعمال فهو جائز لأن لهؤلاء ولاية استعمال الصغير من غير عوض بطريق التهذيب والرياضة فمع العوض أولى. (جامع احكام الصغار للعلامة الاستروشنى: ١/٢١٤، اوائل الاجارة)

وفيه أيضاً: وفي آخر الفصل الثامن من إجارات الذخيرة وهكذا نقول فيمن سكن دار صغير أو حانوت صغير وأنه معد للاستغلال أنه يجب أجر المثل، إلا إذا انتقص بسبب سكناه وضمان النقصان انفع في حق الصغير فحينئذٍ يجب ضمان النقصان. (جامع احكام الصغار على هامش جامع الفصولين: ١/٢١٩، فى مسائل الاجارات)

وفى الفتاوى الهندية: قبول الهبة من الصبي صحيح إذا تمحضت الهبة منفعة في حق الصغير، أما إذا كان في هذا ضرر للصبي لا يصح حتى أنه إذا وهب رجل لصبي عبداً أعمى أو تراباً في دار قيل: إن كان يشترى منه ذلك فإنه يصح قبوله ولا يرد، وإن كان لا يشترى منه بشيء ويلزمه مؤونة النقل ونفقة العبد فإنه يرد ذلك. (الفتاوى الهندية: ٤/٣٩٣)

Allāh taʿālā knows best.

Gifting infant formula

Question

A person bought tins of infant formula for his child. The child no longer needs it. Can these tins be given to another child?

Answer

According to the jurists, it is lawful for parents to eat edible items which are given to a child as a gift. Therefore, edible items which a child no longer needs can be given to others.

إذا أهدى الصغير شيئاً من المأكولات روي عن محمد أنه يباح لوالديه وشبه ذلك بضيافة المأذون وأكثر مشايخ بخارى على أنه لا يباح، وفي كراهية التجنيس إذا أهدى الفواكه إلى الصبي الصغير يحل للأب والأم الأكل إذا أريد بذلك بر الأب والأم لكن أهدى إلى الصغير استصغاراً للهدية، لجواز الذي يلعب به الصبيان يوم العيد يؤكل لما روي عن ابن عمر رضي الله عنه أنه كان يشترى الجوز لصبيانه يوم الفطر يلعبون به ويأكل منه وهكذا فعل عليص بجواريه. (جامع احكام الصغار: ١/١٤٦، فى مسائل الكراهية)

و يباح لوالديه أن يأكلا من مأكول وهب له وقيل لا، انتهى فأفاد أن غير المأكول لا يباح لهما إلا لحاجة. وفى الشامية: قال فى التاتارخانية روي عن محمد نصاً أنه يباح، وفى الذخيرة وأكثر مشايخ بخارى على أنه لا يباح. (الدر المختار: ٥/٦٩٦، سعيد)

قال العلامة الفقيه طاہر بن عبد الرشيد البخاري: وفي الفتاوىٰ: رجل وہب للصغير شيئاً من المأكول يباح للوالدين أن يأكلا منہ كذا روي عن محمد. (خلاصة الفتاوىٰ: ٤/٤٠٠، جنس آخر فى الہبة من الصغير. وكذا فى البحر الرائق: ٧/٢٨٨، نقلاً عن الخلاصة)

Allāh taʿālā knows best.

Spending a child's money for his expenses

Question

Someone or the father himself gave an amount of money to a minor. Can the father use this money to buy clothes and other similar items for this minor? Does the father have to bear his child's expenses by himself?

Answer

If a child has some money with him, his father can use it to pay for the child's expenses. However, he may not spend that money on futilities. It is essential for him to be extremely cautious with his child's money.

فإن نفقة المملوک على مالكہ والغني في مالہ الحاضر. وفى الشامية: قولہ في مالہ الحاضر، يشمل العقار والأردية والثياب، فإذا احتيج إلى النفقة كان للأب بيع ذلک كلہ وينفق عليہ لأنہ غني بہذہ الأشياء بحر، وفتح. (الدر المختار مع فتاوى الشامى: ٣/٦١٢، سعيد)

وفى البحر الرائق: الصغير إذا كان لہ مال فنفقتہ في مالہ. (البحر الرائق: ٤/٢٠١، كوئٹہ)

وفى الفتاوى الہندية: إرضاع الصغير إذا كان يوجد من ترضعہ إنما يجب على الأب إذا لم يكن للصغير مال وأما إذا كان لہ مال فتكون مؤنة الرضاع في مال الصغير كذا فى المحيط. (الفتاوى الہندية: ١/٥٦٠)

Imdād al-Fatāwā:

Question: A minor's paternal or maternal grandfather gives him some money. How should his parents use it? If they spend it on his food and

clothing, this is really the parents' responsibility until the child reaches puberty. Should they save the money as a trust until he becomes mature, or should they spend it on buying sweets and other non-essentials?

Answer: The following is stated in *ad-Durr al-Mukhtār*:

ولطفله الفقير الحر لأن نفقة المملوك على ملكه والغني في ماله الحاضر.

We learn from the above that if a minor owns any money, his expenses will first be paid from his money. In the presence of that money, it will not be obligatory on the father to pay for his essentials. Thus, to answer your question, these gifts should be spent for the essential expenses of the minor.[1]

If a child – whether a male or female – becomes an owner of wealth whether through a gift or inheritance, then the child's expenses will have to be paid from that wealth. The parents' responsibility is merely to make arrangements for the correct spending of that wealth.[2]

Allāh taʿālā knows best.

Accepting a gift from a minor

Question

Is it permissible to accept a gift from a minor?

Answer

If an item is given for the use of children, it will be permissible to give it to someone else with the parents' permission. Based on this, it will be permissible for a teacher to accept it.

Imdād al-Muftīyyīn:

If a student gives a gift, it will be permissible to accept on two conditions: (1) If he is mature, he must give it by his own free will. If he is a minor, it is essential to obtain his parents' approval. (The meaning of the parents' approval is that it belongs to his parents.) (2) The

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[1] *Imdād al-Fatāwā*, vol. 3, p. 480.

[2] *Imdād al-Fatāwā*, vol. 2, p. 533.

teacher must not give the impression to his students that if they do not give him a gift, it will be to their disadvantage.[1]

لو أحضر الصغير لأحد ہدية وقال لہ أرسلني أبي بہذہ الہدية لک فلذلک الشخص تناول تلک الہدية ما لم يقع في قلبہ أن الصغير المذكور كاذب في قولہ ہذا. (درر الحكام شرح مجلة الاحكام: ٢/٣٩٨، دار الكتب العلمية بيروت)

وفي جامع أحكام الصغار: وفي ہبة الملتقط: صبي أہدى وقال: إني أرسل إليک بہذہ الہدية يحل لہ التناول إلا أن يقع في قلبہ أنہ كاذب. (جامع احكام الصغار: ١/١٨٣، فى مسائل الہبة)

وكذا فى الفتاوى الہندية: ٤/٣٩٣، قبول الہدية من الصغير)

Allāh ta'ālā knows best.

When a father gives his shop to his son

Question

A father gave a shop to his son. The father does not have a hand in the daily operations of the shop; his son does everything. However, the father comes and sits in the shop daily. All calculations, accounting, etc. are done by the son. According to the Sharī'ah, has the son taken possession of the shop? What will the ruling be if the father also plays a role in the daily operations of the shop?

Answer

If the father gave the shop to his son and gave him control of it, then it has come into the son's ownership even if the father comes to the shop occasionally or all the time. But if the father gave the shop to his son but has it under his control, it has not come into the son's ownership. The shop is still in the father's ownership.

وشرائط صحتہا فى الموہوب أن يكون مقبوضاً غير مشاع مميزاً غير مشغول.

وفى الشامية: وتصح الہبة بـ"كـوہبت"، وفيہ دلالة على أن القبول ليس بركن كما أشار إليہ فى الخلاصة وغيرہا، وذكر الكرماني أن الإيجاب فى الہبة عقد

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[1] *Imdād al-Muftīyyīn*, vol. 2, p. 733.

تام، وفی المبسوط أن القبض کالقبول فی البیع. (فتاوی الشامی مع الدر المختار: ٥/٦٨٨، کتاب الہبة، سعید)

(وکذا فی تبیین الحقائق: ٥/٩٢، ملتان)

وفی رد المحتار: وفی شرح المجمع لابن ملک عن المحیط لو کان أمرہ بالقبض حین وہب لا یتقید بالمجلس ویجوز قبضہ بعدہ. (فتاوی الشامی: ٥/٦٨٨، کتاب الہبة، سعید)

وفي خزانة الفتاویٰ: إذا دفع لابنہ مالاً فتصرف فیہ الابن یکون للأب إلا إذا دلت دلالة التملیک بیری، قلت: فقد أفاد أن التلفظ بالإیجاب والقبول لا یشترط بل تکفی القرائن الدالة علی التملیک کمن دفع لفقیر شیئاً وقبضہ ولم یتلفظ واحد منہما بشيء. (فتاوی الشامی: ٥/٦٨٨، کتاب الہبة، سعید)

وفی الفتاوی الہندیة: رجل دفع إلی ابنہ في صحتہ مالاً یتصرف فیہ ففعل وکثر ذلک فمات الأب إن أعطاہ ہبة فالکل لہ وإن دفع إلیہ لأن یعمل فیہ للأب فہو میراث کذا في جواہرالفتاویٰ. (الفتاوی الہندیة: ٤/٣٩٢)

In short, if all operations of the shop are in the control of the son, it will considered to be in the son's possession and the giving over will be complete. If the father has maintained all operations of the shop in his control, possession by the son has not taken place and the grant will be incomplete.

Allāh taʿālā knows best.

A verbal gifting

Question

A father said to his daughter: "I have given you this house." However, he did not register the house in his daughter's name. Both parents continued living in that house and bore all its expenses. The daughter and parents understood that the house is the daughter's. Now that the parents have passed away, other heirs are demanding their rights in this house. The daughter is claiming that her parents had given the house to her. Who is the valid owner of this house?

Answer

The father merely gifted the house to his daughter verbally. He did not give her ownership control over it. The gifting is therefore invalid, and the house will be distributed among all the heirs as per the shares delineated by the Sharīʿah.

منها(شرائط الهبة) أن يكون الموهوب مقبوضاً حتى لا يثبت الملك للموهوب له قبل القبض. (الفتاوى الهندية: ٤/٣٧٤)

For the gifting to be complete and valid, it is a precondition for complete control/possession of the item to take place.

شرائط صحتها فى الموهوب أن يكون مقبوضاً غير مشاع مميزاً غير مشغول ...وتتم الهبة بالقبض الكامل. (الدر المختار: ٥/٦٨٨)

Since the deceased had full control over the property until his death, and an ownership control over it is not established in favour of the son or daughter during his lifetime, this gifting is not considered. All heirs have a claim to it and can take their respective shares.

إذا مات الواهب قبل قبض الموهوب له الهبة بطلت وتكون ميراثاً من الواهب كما فى متروكاته. (٤/٥٧٣)

Allāh taʿālā knows best.

Gifting on the day of ʿĀshūrā'

Question

What do the ʿulamā' and muftīs say with regard to the following:

1. What is the ruling with regard to giving gifts to each other on the day of ʿĀshūrā'?
2. What is the ruling with regard to assembling family people on the day of ʿĀshūrā'?
3. Is it okay to congratulate people on the day of ʿĀshūrā' merely to express one's joy?
4. Nowadays people are in the habit of sending ʿĀshūrā' messages via their mobile phones. What is the ruling in this regard?

Answer

(1)

The rule of the Sharīʿah is that if an act is not considered to be Sunnah and mustahab, then affirmation of its origin is sufficient. Furthermore, if the action is not in conflict with the accepted principles of the Sharīʿah, then there is room to do it. There are many examples of this nature in the Sharīʿah. For example, a mere affirmation suffices for taʿwīdh or blowing on certain items. There is no need for a specific proof. Giving a gift on the day of ʿĀshūrā' as an expression of happiness, love and affinity will be permissible provided it is not considered to be essential and a Sunnah. The moment it is considered to be necessary, and those who do not give are frowned upon, it will not be permissible. One will have to abstain from it.

However, these practices gradually turn into customs or they are believed to be from the Sharīʿah. This is why it is better to abstain from them.

(١) روى البخارى عن أبي هريرة رضي الله عنه عن النبي صلى الله عليه وسلم قال: يا نساء المسلمات لا تحقرن جارة لجاتها ولو فرسن شاة. (رواه البخارى: ١/٣٤٩)

(٢) وروى أيضاً عنه عن النبي صلى الله عليه وسلم قال: لو دعيت إلى ذراع أو كراع لأجبت ولو أهدى إلي ذراع أو كراع لقبلت. (رواه البخارى: ١/٣٤٩)

(٣) وروى أيضاً عن ابن عباس رضي الله عنه قال: أهدت أم حفيد خالة ابن عباس رضي الله عنه إلى النبي صلى الله عليه وسلم أقطاً وسمناً وأضباً فأكل النبي صلى الله عليه وسلم من الأقط والسمن. (رواه البخارى: ١/٣٥٠)

وعن عائشة رضى الله تعالىٰ عنها أن النبي صلى الله عليه وسلم كان يقبل الهدية ويثيب عليها. (رواه البخارى: ١/٣٥٢)

قال رسول الله صلى الله عليه وسلم: تهادوا تحابوا. (رواه البيهقى فى سننه الكبرى، والبخارى فى الادب المفرد)

عن أبي هريرة رضي الله عنه عن النبي صلى الله عليه وسلم قال: تهادوا فإن الهدية تذهب وحر الصدر ولا تحقرن جارة لجارتها ولو شق فرسن شاة. (رواه الترمذى)

وعن أنس بن مالک رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم: يا معشر الأنصار تهادوا فإن الهدية تحل السخيمة وتورث المودة. (مجمع الزوائد: ٤/١٧٢)

(2)

Providing one's family with good and abundant foods on the day of 'Āshūrā' is established from Ahādīth and books of jurisprudence. But it is not necessary to assemble for this. If the family members assemble occasionally, it will be acceptable provided the assembling is not adulterated by evil and un-Islamic actions. Yes, it will be best to abstain from assembling.

Faqīh Abul Layth Samarqandī rahimahullāh writes in *Tanbīh al-Ghāfilīn*:

عن أبي هريرة رضي الله عنه عن النبي صلى الله عليه وسلم قال: من وسع على عياله يوم عاشوراء وسع الله عليه سائر السنة، قال سفيان: جربناه فوجدناه كذلک. (١/٣٣٢)

Although this narration is weak, there is room to practise on it for virtues of actions. The jurists too believe that this Hadīth can be practised upon.

An investigation of this Hadīth can be found in volume one of *Fatāwā Dār al-'Ulūm Zakarīyyā* under the "Chapter on Hadīth".

(3)

This action is established from the Sahābah radiyallāhu 'anhum on the days of celebration and the days of 'Īd. Therefore, if a person does not believe it to be necessary and says it solely as an expression of joy, then there is room for its permissibility. However, practices of this nature are gradually considered to be instructions of the Sharī'ah. One should therefore abstain from them.

أخرج الطبراني برواية حبيب بن عمر الأنصارى عن أبيه قال: لقيت واثلة بن الأسقع يوم عيد فقلت: تقبل الله منا ومنک، فقال: نعم، تقبل الله منا ومنک. (المعجم الكبير للطبرانى: ١٥/٤٣٠/١٧٥٨٩). (وكذا فى مجمع الزوائد: ٢/٤٤٢، التهنية بالعيد)

وأخرج البخاري عن عبد الله بن كعب بن مالک عن أبيه في حديث طويل في قصة غيابه عن غزوة تبوک ثم إجابة الله توبته بعد خمسين يوماً تقريباً، يحكى حال مجيئته إلى المسجد بقوله: قال كعب رضي الله حتى دخلت المسجد فإذا برسول الله صلى الله عليه وسلم جالس حوله الناس فقام إلى طلحة بن عبيد الله رضي الله يهرول حتى صافحني وهناني إلى آخر الحديث. (رواه البخارى: ٢/٦٣٦)

وفي كشف الخفاء: التهنية بالشهور والأعياد مما اعتاده الناس، قال فى المقاصد: مروي فى العيد أن خالد بن معدان لقي واثلة بن الأسقع رضي الله عنه في يوم عيد فقال له: تقبل الله منا ومنک، فقال له مثل ذلک، وأسنده إلى النبي صلى الله عليه وسلم لكن الأشبه فيه الوقف، وله شواهد عن كثير من الصحابة بينها الحافظ في بعض الأجوبة...وروي فى المرفوع من جملة حقوق الجار إن أصابه خير هنأه... بل أقوى منه ما فى الصحيحين في قيام طلحة رضي الله عنه لكعب رضي الله عنه وتهنيته بتوبة الله عليه. (كشف الخفاء: ١/٣٢٠)

وكذا فى (المقاصد الحسنة، ص٩٢)

قال فى الدر: ندب...وإظهار البشاشة وإكثار الصدقة والتختم والتهنئة بتقبل الله منا ومنكم لا تنكر. قال الشامي: وقال المحقق ابن أمير حاج : بل الأشبه أنها جائزة مستحبة... ثم ساق آثاراً بأسانيد صحيحة عن الصحابة رضي الله

عنهم في فعل ذلك. (الدر المختار مع فتاوى الشامى: ٢/١٦٩، باب العيدين، سعيد)

Further reading: *Fatāwā Dār al-ʿUlūm Zakarīyyā*, vol. 2, p. 582.

In short, the lives of Muslims are already filled with customs. Therefore, the customs of gifting and congratulating each other ought to be given up even if they are not considered to be a part of Dīn.

Allāh taʿālā knows best.

Gifting on non-Islamic occasions

Question

What is the ruling with regard to giving and receiving gifts on the occasion of Christmas and other non-Islamic occasions? Can we gift to Christians because of our business relationships with them? They send gifts to us when we observe our Islamic celebrations. Our purpose in giving them is to maintain our business ties and not to accord reverence to their religion.

Answer

If there is no intention of according reverence to their religion and it is done merely to maintain superficial business ties, then it is permissible to send gifts to them. However, it is better not to give the gift on Christmas day. It may be given before or after.

ولو أهدى لمسلم ولم يرد تعظيم اليوم بل يجرى على عادة الناس لا يكفر وينبغي أن يفعله قبله أو بعده نفياً للشبهة. (فتاوى الشامى: ٦/٧٥٤، سعيد)

After quoting certain juridical texts, Hadrat Thānwī rahimahullāh writes in *Imdād al-Fatāwā:*

From the above narrations we have learnt the detailed injunctions related to gifting. If there is no harm to our religion, it will be permissible to exchange gifts with unbelievers with whom we have made peace. This answers most of the questions. Two points need to be addressed. (1) The Diwali gift is probably given out of reverence for this festival. And this has been strictly prohibited by the jurists. (2) There are images in it, and this would necessitate preserving and revering them. There is prohibition in this regard in certain subsidiary matters. This would necessitate a conflict with the injunction of the Sharīʿah.

The answer to the first point is that it is known through habit that the reason for the gift is to show respect to the person and not the festival. The answer to the second point is that the purpose of the gift is not the image but the actual item. However, it is obligatory for the one who receives the gift to destroy the image immediately.[1]

Maulānā ʿAbd al-Hayy Lucknowī rahimahullāh writes:

Question: If Hindus offer sweetmeats or other gifts to Muslims on occasions of Holi or Diwali, is it permissible for Muslims to accept them?

Answer: It is permissible, but one should not join the unbelievers in expressing joy and happiness over their festivals. It is stated in *Majmaʿ al-Barakāt* that if on the day of Nīrauz – a day of festivity for the Magaens – one's friends from that religion bring edibles, it is permissible to accept them. Is there any Dīnī harm for the person to accept the gift? Some scholars say that if the person joins them in their happiness, then he suffers Dīnī harm. If he does not join them, there is no harm on him. Despite this, it is preferable to desist. The same ruling is stated in *Matālib al-Mu'minīn*.[2]

Allāh taʿālā knows best.

Depositing money in a son's name

Question

In order to save himself from taxation, a person deposits money in a bank in his son's name. Since it is in the son's account, will it be said that the son is its owner?

Answer

The deposit in the bank was not with the intention of giving ownership to the son, it was for some other reason. The son is not its owner. Yes, if the intention was to make him its owner, he will be its owner.

Hadrat Muftī Muhammad Shafīʿ Sāhib rahimahullāh writes:

If Zayd did not give over ownership of this house to his wife in reality, but wrote her name in official documents for some other reason, the house does not belong to his wife. If she passes away, her heirs will

[1] *Imdād al-Fatāwā*, vol. 3, p. 482.

[2] *Muʿallim al-Fiqh – tarjamah Majmūʿah al-Fatāwā*, vol. 2, p. 363; also pages 358 and 382.

have no claim over that house. Rather, it will remain in the ownership of Zayd as it always was. Including a person's name in official documents does not give a person right of ownership according to the Sharīʿah. Ownership will only be realized when the owner gives over the item happily, makes the person its owner and gives him control over it. These points are clearly gauged from the books of jurisprudence.[1]

Further reading: *Fatāwā ʿUthmānī*, vol. 3, p. 445.

Allāh taʿālā knows best.

When a mother gives a house to her son

Question

My mother gave me a house which is in India. This was given to me when she was alive and well. She has now passed on. What is the ruling with regard to this house? I have a sister; does she have a share in this house?

Answer

If your mother gave you the house and gave you or your representative control over it, it is yours. No one else has a claim over it.

ولا يتم حكم الهبة إلا مقبوضة ويستوي فيه الأجنبي والولد إذا كان بالغاً هكذا فى المحيط، والقبض الذي يتعلق به تمام الهبة وثبوت حكمها القبض بإذن المالک والإذن تارة يثبت نصاً وصريحاً وتارة يثبت دلالة. (الفتاوى الهندية: ٤/٣٧٧، الباب الثانى فيما يجوز من الهبة وما لا يجوز)

شرح المجلة:

لو وهب أحد جميع أمواله في حال صحته لأحد ورثته وسلمه إياها وتوفى بعد ذلک فليس لسائر الورثة المداخلة فى الهبة المذكورة، (على أفندي)، مثلاً لو وهب من كان له عدة أولاد جميع أمواله لأحدهم في حال صحته وسلمه إياها

[1] *Imdād al-Muftīyyīn*, vol. 2, p. 738.

كانت صحيحة (البزازية). (درر الحكام شرح مجلة الاحكام: ٢/٤٣٣، المادة: ٨٧٩)

Allāh ta'ālā knows best.

When a debtor pays his debt to someone other than his creditor

<u>Question</u>

'Umar was owing R5 000 to Zayd. Bakr is Zayd's friend. Zayd said to 'Umar: "Do not pay the loan to me; give it to Bakr. I have given it to him." He then said to Bakr: "You must take it." 'Umar then gave the money to Bakr. Subsequently, the relationship between Zayd and Bakr became sour, and Zayd is asking for the R5 000. Bakr has spent the money. Zayd and 'Umar are both scholars. Zayd presented the following proof from a book of jurisprudence:

تمليك الدين من غير المديون لا يصح.

What should Bakr do?

<u>Answer</u>

When Zayd asked 'Umar to give the money to Bakr, and 'Umar did as instructed, the gifting is complete and Zayd's loan has been repaid. Zayd cannot make any demand on 'Umar. As for تمليك الدين من غير المديون when Zayd himself gave the permission to 'Umar, it is valid and the gifting is complete.

أجيب بأن هبة الدين من غير المديون إنما لا تجوز إذا لم يأذن للغير في قبضه فأما إذا وهب الدين من آخر وأذن له في قبضه جاز استحساناً. (فتح القدير، كتاب الكفالة، ٧/١٩٠، دار الفكر)

إن تمليك الدين من غير من عليه الدين يصح استحساناً إذا وهبه وأذن له فى القبض فقبضه، وهذا لأن ذلك إنما لا يصح لأنه تمليك ما لا يقدر على تسليمه، وإذا أذن له بالقبض صار كأنه أخرجه من الكفالة ووكله بالقبض فقبضه ثم وهبه إياه وحينئذٍ يكون تمليك الدين ممن عليه الدين وهو جائز. (العناية فى شرح الهداية على هامش فتح القدير: ٧/١٩٠، دار الفكر)

بدائع الصنائع:

وأما ہبة الدين لغير من عليہ الدين فجائز أيضاً إذا أذن لہ بالقبض وقبضہ استحساناً والقياس أن لا يجوز وإن أذن بالقبض... وجہ الاستحسان أن ما فی الذمة مقدور التسليم والقبض ألا ترى أن المديون يجبر على تسليمہ إلا أن قبضہ بقبض العين فإذا قبض العين قام قبضها مقام قبض عين ما فی الذمة إلا أنہ لا بد من الإذن بالقبض صريحاً ولا يكتفي فيہ بالقبض بحضرةالواہب بخلاف ہبةالعين. (بدائع الصنائع فی ترتيب الشرائع: ٦/١١٩، فصل فی شرائط الہبة، سعيد)

المبسوط:

ہبة الدين من غير من عليہ الدين جائزة، فإذا سلطہ عليہ فہو مسلط عليہ فی الجملة أو يجعل ذلک نقلاً للدين منہ، بمقتضى الہبة منہ فيصير ہبة الدين ممن عليہ الدين لو أمكن ذلک لأن لہ ولاية نقل الدين إليہ قصداً بإحالة الدين عليہ فيثبت ذلک بمقتضى تصرفہما تصحيحاً لہ. (المبسوط للامام السرخسی: ٢٠/٩٢)

المحيط البرهانی:

أن الواہب لما أمره بالقبض فقد جعلہ نائباً عن نفسہ فی القبض فيقع قبض الموہوب للواہب أولاً ثم لنفسہ أو أن عمل الہبة ما بعد القبض وبعد القبض ہو مال محل للتمليک. (المحيط البرہانی: ٧/١٧٤)

وللاستزادة انظر: (المحيط البرہانی: ٦/٩٢، و٧/١٧٤، كتاب الہبة والصدقة. ورد المحتار: ٥/٧٠٨، سعيد. وشرح المجلة: ٣/٣٦٠. والفتاوى الہندية: ٤/٣٨٤. والبحر الرائق: ٧/٢٨٤. وتبيين الحقائق: ٣/١١، ملتان)

Allāh taʿālā knows best.

Distributing one’s wealth during one’s lifetime

Question

Can a person distribute his wealth, properties, etc. during his lifetime?

Answer

Distributing one’s wealth during one’s lifetime is classified as hibah (a gift/grant) and this is valid. As per the preferred fatwā, a person must be cognizant of equality among his children. However, giving more to some over others is also acceptable. At the same time, it is not permissible to cause harm to anyone. Differentiation on the basis of religiosity and impiety is permissible. In fact, it is better and superior to give a little more to the one who is religious, pious and an adherent of the Sharī῾ah.

رجل لہ ابن وبنت أراد أن یہب لہما شیئاً فالأفضل أن یجعل للذکر مثل حظ الانثیین عند محمد وعند أبي یوسف بینہما سواء ہو المختار لورود الآثار.

ولو وہب جمیع مالہ لابنہ جاز فی القضاء وہو آثم نص عن محمد ہکذا فی العیون، ولو أعطی بعض ولدہ شیئاً دون البعض لزیادة رشدہ لا بأس بہ وإن کانا سواء لا ینبغي أن یفضل، ولو کان ولدہ فاسقاً فأراد أن یصرف مالہ إلی وجوہ الخیر ویحرمہ عن المیراث ہذا خیر من ترکہ لأن فیہ إعانة علی المعصیة، ولو کان ولدہ فاسقاً لا یعطی لہ أکثر من قوتہ. (خلاصة الفتاویٰ: ٤/٤٠٠، جنس آخر فی الہبة من الصغیر)

لو وہب أحد جمیع أموالہ في حال صحتہ لأحد ورثتہ وسلمہ إیاہا وتوفی بعد ذلک فلیس لسائر الورثة المداخلة فی الہبة المذکورة، (علی أفندي)، مثلاً لو وہب من کان لہ عدة أولادہ جمیع أموالہ لأحدہم في حال صحتہ وسلمہ إیاہا کانت صحیحة (البزازیة)، ومع ذلک فترجیح بعض الأولاد علی البعض مکروہ کراہیة تحریمیة (أبو السعود المصری) ویکرہ ذلک عند تساویہم فی الدرجة أما عند عدم التساوی کما إذا کان أحدہم مشتغلاً بالعلم لا بالکسب لا بأس أن یفضلہ علی غیرہ أی لا یکرہ إذا کان التفضیل لزیادة

فضل لہ فی الدین، فعلیہ (علی الواہب) مراعاۃ المساواۃ فی الہبۃ لأولادہ حتی لو وہب لابنہ وابنتہ یجب أن یعطی البنت کما یعطی الصبي وہذا ہو المفتیٰ بہ (الطحطاوی)، وقد روی أحد الصحابۃ رضی اللہ تعالیٰ عنہ أن أباہ قد وہبہ مالاً وأراد أن یشہد النبي صلی اللہ علیہ وسلم علی ہذہ الہبۃ فتمثلت أنا مع أبي في حضور النبي صلی اللہ علیہ وسلم وذکر أبي لہ الأمر فسألہ الرسول صلی اللہ علیہ وسلم ألک أولاد غیرہ؟ أجابہ أبي: نعم یا رسول اللہ فقال لہ، ہل وہبتہم مثل ما وہبت ہذا؟ فقال أبي: کلا، فقال صلی اللہ علیہ وسلم: ہذا جور: أی ظلم (العنایۃ)، إلا أنہ إذا کان أحد الأولاد یفضل غیرہ فی العلم والکمال فلا بأس من ترجیحہ علی غیرہ کما بین فی الکتب الفقہیۃ مساغاً للترجیح (أبو السعود المصری) وإن کان في أولادہ فاسق لا ینبغي أن یعطیہ أکثر من قوتہ کي لا یصیر معیناً لہ فی المعصیۃ ولو کان ولدہ فاسقاً فأراد أن یصرف مالہ إلی وجوہ الخیر ویحرمہ عن المیراث ہذا خیر من ترکہ، (الطحطاوی باختصار). (درر الحکام شرح مجلۃ الاحکام لعلی حیدر، ٢/٤٣٣، تحت المادۃ: ٨٧٩، دار الکتب العلمیۃ بیروت)

وللاستزادۃ انظر: (الدر المختار مع رد المحتار: ٥/٦٩٦، کتاب الہبۃ، سعید. البحر الرائق: ٧/ ٢٨٨، کتاب الہبۃ. والفتاوی الہندیۃ: ٤/٣٩١، فی الہبۃ للصغیر. وتکملۃ رد المحتار: ٨/٤٥٥، سعید)

Ahsan al-Fatāwā:

1. If it is the aim to cause harm to others, then it is makrūh tahrīmī. The distribution will be promulgated by law, but it will be obligatory to return it under religious integrity.
2. It the objective is not to harm others and there is also no reason for giving preference to one over others, then it is makrūh tanzīhī. It is mustahab to give equally to males and females.
3. It is mustahab to give preference if it is done on the basis of religiosity, service, religious services, or need.

4. Irreligious children should not be given more than their basic needs. It is mustaḥab to deprive them and to give the extra wealth for religious works.[1]

Allāh taʿālā knows best.

Equality at the time of distribution

Question

In normal conditions a person has to be mindful of equality when distributing his wealth among his children. However, equality is not obligatory; it is better and superior. On the other hand, the annotator to *al-Majallah* states that equality is obligatory. What does this mean? (Refer to *Sharḥ al-Majallah*, vol. 2, p. 433) Maulānā Khālid Sayfullāh Ṣāḥib is also of the view that it is obligatory.

Answer

The verdict of Ḥanafī scholars is that in normal conditions, when distributing one's wealth among one's children, equality is better and superior; it is not obligatory. Yes, if a person wants to unnecessarily cause harm to some of his children, then equality will be obligatory.

ولو وهب لأولاده فى الصحة وأراد تفضيل البعض على البعض عن أبى حنيفة لا بأس به إذا كان التفضيل لزيادة فضل فى الدين وإن كانا سواء يكره، وروى المعلى عن أبى يوسف أنه لا باس به إذا لم يقصد به الإضرار وإن قصد به الإضرار سوى بينهم وهو المختار ولو كان الولد مشتغلاً بالعلم لا بالكسب فلا بأس أن يفضله على غيره. (الفتاوى الهندية: ٤/٣٩١، كتاب الهبة)

اعلاء السنن:

والحاصل أن قول الأمر بالتسوية بين الأولاد على الوجوب خلاف القياس وذهب الجمهور إلى أن التسوية مستحبة فإن فضل بعضاً صح وكره وجعلوا الأمر فى حديث النعمان على الندب والنهى على التنزيه. (اعلاء السنن:١٦/١٠١-١٠٢، ط: ادارة القرآن)

[1] *Aḥsan al-Fatāwā*, vol. 7, p. 256.

عمدة القاري:

فإن قلت فى حديث الباب الأمر بالرجوع صريحاً حيث قال: "فارجعه" قلت: ليس الأمر على الإيجاب وإنما هو من باب الفضل والإحسان ألا ترى إلى حديث أنس رضي الله عنه رواه البزار فى مسنده أن رجلاً كان عند رسول الله صلى الله عليه وسلم فجاء ابن له فقبله وأجلسه على فخذه وجاءته بنية له فأجلسها بين يديه فقال رسول الله صلى الله عليه وسلم ألا سويت بينهما وليس هذا من باب الوجوب وإنما هو من الإنصاف والإحسان. (عمدة القارى: ٩/٤٠٥، كتاب الهبة، ط ملتان)

إن عمل الخليفتين أبى بكر وعمر بعد النبى صلى الله عليه وسلم على عدم التسوية قرينة ظاهرة فى أن الأمر للندب. (عمدة القارى: ٩/٤٠٧، كتاب الهبة، ط: ملتان)

وقد تمسک به من أوجب التسوية فى عطية الأولاد وبه صرح البخارى وهو قول طاووس والثورى وأحمد وإسحاق. وقال أبو يوسف تجب التسوية إن قصد بالتفضيل الإضرار وذهب الجمهور إلى أن التسوية مستحبة فإن فضل بعضاً صح وكره واستحبت المبادرة إلى التسوية أو الرجوع فحملوا الأمر على الندب والنهى على التنزيه. (اوجز المسالک: ١٤/١٧٥ باب ما يجوز من النحل)

وللمزيد أنظر: عمدة القاري، ج ٩، ص ٤٠٨. وفيض الباري، ج ٣، ص ٣٦٨. وتكملة فتح الملهم، ج ٢، ص ٦٨.

<u>A reply to the text of *Sharh al-Majallah*</u>

The text reads as follows:

على الواهب مراعاة المساواة فى الهبة لأولاده حتى لو وهب لابنه وابنته يجب أن يعطى البنت كما يعطى الصبي وهذا هو المفتى به (الطحطاوى). (درر الحكام شرح مجلة الاحكام: ٢/٤٣٤)

The annotator of *Sharh al-Majallah* - ʿAlī Haydar rahimahullāh – presents the view that it is obligatory to maintain equality when distributing wealth among one's children in normal conditions. He bases his view on the authority of ʿAllāmah Sayyid Ahmad Tahtāwī rahimahullāh. However, when we study the original text of ʿAllāmah Tahtāwī rahimahullāh, we do not deduce the view of obligation. Observe the text of ʿAllāmah Tahtāwī rahimahullāh:

قال فى الخانية ولو وهب رجل شيئاً لأولاده فى الصحة وأراد تفضيل البعض على البعض فى ذلك لا رواية لهذا فى الأصل عن أصحابنا وروى عن الإمام أنه لا بأس به إذا كان التفضيل لزيادة فضل له فى الدين وإن كانا سواء يكره وروى المعلى عن أبي يوسف أنه لا باس به إذا لم يقصد به الإضرار وإن قصد به الإضرار سوى بينهم يعطى الابنة مثل ما يعطى الابن قال محمد يعطى للذكر ضعف ما يعطى للانثى والفتوى على قول أبي يوسف. (حاشية الطحطاوى على الدر المختار: ٣/٤٠٠)

The word يجب (it is obligatory) is not mentioned anywhere in the above text. The annotator to *al-Majallah* probably elucidated the view of Imām Abū Yūsuf rahimahullāh from his side because according to the latter, when there is intent to cause harm [to one or more children to the exclusion of others] then equality in distribution is obligatory.

وفى الخانية لا باس بتفضيل بعض الأولاد... إن لم يقصد به الإضرار وإن قصده فسوى بينهم يعطى البنت كالابن عند الثانى وعليه الفتوى وفى الشامية: قوله وعليه الفتوى أى على قول أبي يوسف من أن التنصيف بين الذكر والأنثى أفضل من التثليث الذى هو قول محمد. (الدر المختار: ٥/٦٩٦، سعيد)

وقال أبو يوسف تجب التسوية إن قصد بالتفضيل الإضرار وإلا فهى مستحبة. (تكملة فتح الملهم، ج ٢، ص ٦٨، كتاب الهبات، وكذا فى اوجز المسالك: ١٤/١٧٥)

A reply to the text of Maulānā Khālid Sayfullāh Sāhib

In his *Qāmūs al-Fiqh*, (vol. 5, p. 331), Maulānā says that equality is mustahab. From his *Kitāb al-Fatāwā*, (vol. 6, p. 316), we gauge that equality is obligatory. However, in his *Islām Aur Jadīd Fikrī Masā'il* (p. 164), he uses the word "obligatory" explicitly. There could be a few possibilities:

(1) If it is taken to refer to the person who gives more to one child so as to cause harm to the other children, then the unanimous verdict is that equality is obligatory.

(2) The context and tone of the discussion supports the view that he chose the verdict of obligation because of the corruptness of our times.

(3) He chose the verdict of obligation out of consideration for the Orientalists and those who make objections to inequality.

To summarize: When distributing among one's children during one's lifetime, if the parent does not intend to harm one to the exclusion of others, then he may give preference to one over the others. In other words, equality is mustahab; it is not obligatory.

Further reading: *'Umdah al-Qārī*, vol. 9, p. 405; *Takmilah Fath al-Mulhim*, vol. 2, p. 68; *Aujaz al-Masālik*, vol. 14, p. 175; *Fatāwā Mahmūdīyyah*, vol. 16, p. 497; *I'lā' as-Sunan*, vol. 16, p. 96.

Allāh ta'ālā knows best.

A gift when possession has not been taken of it

Question

A person passed away in 2006. He had a will in which he stated that after his demise, his estate will be divided among his heirs according to the Sharī'ah. Nine months after he passed away, his son by the name of Yahyā made a claim with respect to a piece of land. He claims that his father gave it to him on 2 March 2004. He presented a written document in which the gifting of the land to him is clearly stated. This

document contains the signatures of Muhammad (a son of Yahyā) and a non-Muslim African woman. There are no other witnesses to it. Yahyā hadn't taken control of the land nor did he have it registered in his name. Furthermore, none of the other heirs have any knowledge about it. Will this piece of land be considered to belong to Yahyā or will all the heirs have a right over it?

Answer

This gifting is incomplete because taking control of the item is necessary for a gifting to be complete. Taking control of the item is not established. Secondly, the testimony of the signatories to the written document is unacceptable. The testimony of a son in favour of his father is not acceptable. Also, the testimony of a non-Muslim against a Muslim is not acceptable. Based on this, the piece of land is not in the ownership of Yahyā. It will therefore be distributed among all the shares as laid down by the Sharīʿah.

وشرائط صحتها فی الموہوب أن یکون مقبوضاً غیر مشاع ممیزاً غیر مشغول ...وتتم الہبة بالقبض الکامل. (الدر المختار: ٥/٦٨٨، ٦٩٠، کتاب الہبة، سعید)

منہا (شرائط الہبة) أن یکون الموہوب مقبوضاً حتی لا یثبت الملک للموہوب لہ قبل القبض. (الفتاوی الہندیة: ٤/٣٧٤)

ولا شہادة الولد لوالدیہ و أجدادہ و جداتہ من قبلہما وإن علو. (الفتاوی الہندیة: ٣/٤٦٩ کتاب الشہادات، الفصل الثالث فیمن لا تقبل شہادتہ للتہمة)

فیشترط الإسلام لو المدعی علیہ مسلماً. (الدر المختار: ٥/٤٦٢، کتاب الشہادات، سعید)

Fatāwā ʿUthmānī:

A written document for the gifting of an item is not necessary according to the Sharīʿah. It can be done verbally as well. However, what is necessary is that the item must be given over into the control of the person to whom it was gifted.[1]

[1] *Fatāwā ʿUthmānī*, vol. 3, p. 443.

Allāh taʿālā knows best.

Gifting before taking possession of one's inheritance

<u>Question</u>

A man passed away and left a house in his estate. It has not been divided [among the heirs] as yet. One of the heirs gave his share to his sister. He has now passed away. The other heirs are disputing this gift, whereas the sister has witnesses to prove that her brother in fact gave his share to her. Is the gifting of the brother valid?

<u>Answer</u>

It is permissible for an heir to forgo his right before taking possession of the [share of his] inheritance or to transfer it into the name of another. Nowadays, houses are like indivisible items. This is why one's share can be given to someone before the division [of the estate] takes place. The presence of witnesses makes this gifting complete and valid. The other heirs have no claim over this share.

وذكرالشيخ الإمام المعروف بـ ''خواہر زادہ'' أن حق الموصى له وحق الوارث قبل القسمة غير متأكد يحتمل السقوط بالإسقاط، انتہیٰ. (الاشباه والنظائر: ١/٢٧٢)

وحق الوارث قبل القسمة يسقط بالإسقاط. (فتاوى الشامى: ٥/٦٤٢، فصل فى التخارج، سعيد)

وفيما لايقسم كالعبد والدابة والثوب والحمام يجوز ہبة المشاع من الشريک وغيره في قولهم - (فتاویٰ قاضيخان على ہامش الهندىة:٣/٢٦٧،كتاب الهبة، فى ہبة المشاع)-

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

Items which are indivisible – e.g. animals – can be gifted before the distribution [of the estate].

قال العلامة الخوارزمي: هبة المشاع فيما لا يقسم جائزة يعني به ما لا يحتمل القسمة أى لا يبقى منتفعاً بعد القسمة أصلاً كعبد واحد أو دابة واحدة. (الكفاية شرح الهداية على هامش فتح القدير: ٧/٤٨٨، كتاب الهبة)[1]

Allāh ta'ālā knows best.

The gifting of rights

Question

Is it permissible to gift rights?

Answer

Rights which are intrinsically established can be transferred and are considered to be essential rights. Gifting with respect to them is permissible. Rights which are established merely for the repulsing of harm cannot be transferred. The right of inheritance is considered to be a right of ownership and an essential right. It can be transferred, and gifting it is also permissible.

والفاصل بين الحق المتقرر وغيره أن ما يتغير بالصلح عما قبله فهو متقرر وغيره غير متقرر واعتبر ذلك فى الشفعة والقصاص، فإن نفس القاتل كانت مباحة في حق من له القصاص، وبالصلح حصل له العصمة في دمه فكان حقاً متقرراً وأما فى الشفعة فإن المشتري يملك الدار قبل الصلح وبعده على وجه واحد فلم يكن حقاً متقرراً. (شرح العناية بهامش فتح القدير: ٩/٤١٦، ما يبطل به الشفعة، دار الفكر)

عدم جواز الاعتياض عن الحقوق المجردة ليس على إطلاقه، بل فيه التفصيل: وهو أن ذلك الحق المجرد إن كان الشرع جعله لصاحبه لأجل رفع الضرر عنه، كحق الشفعة، وحق القسم للزوجة، وحق الخيار للمخيرة، فالاعتياض عنه بمال لا يجوز، لأن حق الشفعة للشفيع، وحق القسم للزوجة، وكذا حق الخيار

[1] *Jadīd Mu'āmalāt Ke Shar'ī Ahkām*, vol. 2, p. 82.

فى النكاح للمخيرة، إنما ثبت لدفع الضرر عن الشفيع والمرأة، وما ثبت لذلك لا يصح الصلح عنه، لأن صاحب الحق لما رضي علم أنه لا يتضرر بذلك، فلا يستحق شيئاً وإن كان ذلك الحق قد ثبت لصاحبه أصالةً لا على وجه رفع الضرر كالوظيفة في وقف من إمامة وخطابة وأذان وفراشة وبوابة، فإن صاحبها قد ثبت له هذا الحق بتقرير القاضي على وجه الأصالة، لا لأجل رفع ضرر عن صاحبه، فينبغي أن يصح الاعتياض عن تلك الوظيفة بمال يأخذه الفارغ، وهو صاحب الوظيفة، من المفروغ له، لأنه صلح عن حق إلحاقاً له بالاعتياض عن القصاص بمال، وبالاعتياض عن النكاح بمال، وما أشبه ذلك. (شرح المجلة للاتاسى: ١١٩/٢،١٢٠)

وفي "بحوث في قضايا فقهية معاصرة": وأما النوع الثاني من الحقوق الشرعية، فهى الحقوق التي تثبت لأصحابها أصالة، لا على وجه دفع الضرر فقط، مثل حق القصاص وحق تمتع الزوج بزوجته ببقاء نكاحها معه، وحق الإرث وما إلى ذلك... أن حق الوراثة في حياة المورث ليس حقاً ثابتاً، بل هو حق متوقع يحتمل الثبوت وعدمه، وإنما يتقرر بموت المورث... وأما بعد موت المورث، فإن ذلك الحق ينتقل إلى ملك مادّى في تركته، فيصح بيعه أو التنازل عنه. (بحوث فى قضايا فقهية معاصرة:١/٧٨،٨٠)

Further reading: *Radd al-Mu<u>h</u>tār*, vol. 4, pp. 518, 520; *<u>H</u>āshiyah a<u>t</u>-<u>T</u>ah<u>t</u>āwī ʿAlā ad-Durr al-Mukhtār*, vol. 3, p. 9; *ʿI<u>t</u>r Hidāyah*, p. 332; *Fiqhī Maqālāt*, vol. 1, p. 163; *Jadīd Fiqhī Masā'il*, vol. 4, p. 176; *<u>H</u>uqūq Aur Oen Kī Kharīd Wa Faraukhat*, p. 147.

Allāh taʿālā knows best.

Gifting in illicit love relationships

<u>Question</u>

A person loves a woman and sends gifts to her. Is it permissible for her to accept them? If the man repents from this illicit love later on, will it be permissible for him to take back those gifts?

Answer

Gifts which are presented in illicit relationships are classified as bribery. It is not permissible to accept them. Ownership of the gifts is not affirmed. The one who gave it has the right to ask for it to be returned. Yes, there is no harm if – after repenting – he does not ask for the gifts to be returned and pardons them.

وفيها (القنية) ما يدفعه المتعاشقان رشوة يجب ردها ولا يملك. (البحر الرائق: ٦/٢٨٦، كتاب الهبة، كوئته)

المتعاشقان يدفع كل واحد منهما لصاحبه أشياء فهي رشوة لا يثبت الملك فيها وللدافع استردادها. (الفتاوى الهندية: ٤/٤٠٣، الباب الحادى عشر فى المتفرقات)

وكذا في مجمع الضمانات، ج ٢، ص ٩٣٨.

Allāh taʿālā knows best.

Using the gifts which were received in an illicit relationship

Question

One of our friends received a mobile phone as a gift from his girlfriend. Later on, their relationship broke off. The boy now wants to sell the mobile phone. Can he use the money which he gets for it or does he have to give it in charity?

Answer

A gift in an illicit relationship is classified as bribery. Thus, it has not entered the ownership of the boy. It is necessary for him to return it to the girl who gave it to him. It is not permissible for him to sell it. If he does sell it, he must convey the money to the girl unless she pardons it and does not ask for it.

لو مات الرجل وكسبه من بيع الباذق أو الظلم أو أخذ الرشوة يتورع الورثة، ولا يأخذون منه شيئاً وهو أولىٰ بهم ويردونها على أربابها إن عرفوهم، والا تصدقوا بها لأن سبيل الكسب الخبيث التصدق إذا تعذر الرد على صاحبه. (فتاوى الشامى: ٦/٣٨٥، فصل فى البيع، سعيد)

Allāh taʿālā knows best.

Gifting for the sake of marriage

Question

A boy loves a girl. They are not involved in an illicit relationship, but he sends a gift to her family so that she or her family may become amenable to a marriage. Will this also be classified as bribery, and therefore impermissible?

Answer

Since there is no illicit relationship between the two, the gift is a means to reconciling the hearts. It will be permissible to accept the gift. Gifts or charity was given to those who are classified as mu'allafatul qulūb (those whose hearts are to be reconciled) for a Dīnī objective. Here, the objective is marriage – which is also a Dīnī objective, and the gift is a means to its realization.

Allāh taʿālā knows best.

A common possession suffices in a gift

Question

My father had my name recorded in the official documents of a building which he gave over to me. The building contains two residences and four shops. These are occupied by tenants. I used to collect the rent while my father was alive and was responsible for the payment of taxes, etc. In other words, I have full control of it. Is this entire process sufficient for the completion of the gift and my control of it? Or is it necessary for me to remove the tenants and then occupy the building physically? Obviously, there is no way to remove the tenants because of the contractual agreements.

Answer

Taking control or possession (qabḏah) of each item is deemed according to the nature of the item. Taking possession of a vehicle is realized when its key is given over to the buyer. In this case, the official documents have been given over to the donee; and so, qabḏah of the building is complete. After the death of the father, the other heirs cannot make any claims of inheritance with respect to this building.

وحاصله أن التخلية قبض حكماً لو مع القدرة عليه بلا كلفة لكن ذلك يختلف بحسب حال المبيع،... قال أجمعوا على أن التخلية فى البيع الجائز

تكون قبضاً...الخ. (رد المحتار: ٥٦٢/٤،٥٦٣، مطلب فى شروط التخلية، سعيد. وكذا فى الفتاوى البزازية على ہامش الهندية: ٤٩٩/٤. والفتاوى الهندية: ١٩/٣)

Jadīd Fiqhī Mabāhith:

The Qur'ān and Hadīth do not lay down a specific method of qabdah. In fact, the Ahādīth contain different forms of taking possession. In a narration of Hadrat ʿAbdullāh ibn ʿUmar radiyallāhu ʿanhu, moving the item from the place of purchase to another place is mentioned. Hadrat Zayd ibn Thābit rahimahullāh narrates that the traders must move their purchased items to their saddlebags. The narration of Hadrat Abū Hurayrah radiyallāhu ʿanhu specifies weighing and measuring as qabdah. This is why the jurists concur that the societal norms of people will be the criterion. The manner in which people consider an item to have moved from the possession of one to the other will be accepted as a Sharʿī qabdah.

ولا يشترط القبض بالبراجم، لأن معنى القبض هو التمكين والتخلي وارتفاع الموانع عرفاً وعادة حقيقة. (بدائع الصنائع: ١٤٨/٥، سعيد. الفتاوى الهندية: ١٦/٣.[1]

Islām Aur Jadīd Maʿāshī Masāʾil:

The seller absolves himself by saying to the buyer: "This wheat which you bought is in my warehouse. You may take it whenever you want. After today, I am not responsible for it. If the wheat is destroyed or gets rotten, it is your responsibility." In such a case, although the buyer did not take physical possession of his goods, they have come under his liability. Any loss suffered to them will be to the buyer's liability. Imām Abū Hanīfah rahimahullāh is of the view that physical possession is not necessary. Takhliyah is sufficient. Takhliyah means that the buyer is given the power to come and take possession of the item whenever he wants. As long as no obstacle from taking possession of it remains, we will conclude that takhliyah has taken place. For example, there is a chest which contains several items. The buyer is given the key to it. Once he receives the key, possession of the chest has taken place irrespective of whether he takes the chest now or not. Imām Bukhārī rahimahullāh gives preference to the view of Imām Abū Hanīfah rahimahullāh and narrates the tradition of Hadrat

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[1] *Jadīd Fiqhī Mabāhith*, vol. 2, p. 151.

Jābir radiyallāhu ʿanhu as a mausūl narration. Rasūlullāh sallallāhu ʿalayhi wa sallam bought a camel from Hadrat Jābir radiyallāhu ʿanhu who then travelled on it to Madīnah. He did not get off that camel, but takhliyah was established. Imām Bukhārī rahimahullāh says that we learn from this incident that possession takes place once takhliyah is effected.[1]

ʿItr Hidāyah:

Qabdah, i.e. acquiring control over an item after obtaining the other's permission – if it is through the permission of the owner or on account of a Sharʿī right – then it will be classified as permissible.

To sum up, qabdah is based on societal norms. These differ with respect to the nature of the items. In the present case, collecting the rent for the building, paying the taxes and other expenses – in other words, having total control over it – is synonymous to qabdah.

Allāh taʿālā knows best.

Accepting a gift from forbidden wealth

Question

If usury enters the wealth of an unbeliever, is it included in his ownership? If a non-Muslim presents a gift from interest wealth to a Muslim, is it permissible for him to accept it? What is the ruling if a Muslim gives a gift from interest wealth?

Answer

When interest wealth comes to a Muslim, he does not become its owner. It is necessary for him to return it. If the owner is known, it must be returned to him. If he is not known, it must be given in charity without the intention of reward. Interest wealth must be treated like a calamity and misfortune which must be disposed of as charity. It is permissible to give it to an eligible poor person who does not own nisāb. However, it is not permissible to accept a gift from interest wealth.

لو رأى المكاس مثلاً يأخذ من أحد شيئاً من المكس ثم يعطيه آخر ثم يأخذ من ذلک الآخر آخر فهو حرام. (فتاوى الشامى: ٥/٩٨، مطلب الحرمة تتعدد، سعيد)

[1] *Islām Aur Jadīd Maʿāshī Masāʾil*, vol. 2, pp. 98, 100.

ويردونها على أربابها إن عرفوهم وإلا تصدقوا بها، لأن سبيل الكسب الخبيث التصدق إذا تعذر الرد على صاحبه. (فتاوى الشامى: ٦/٣٨٥، كتاب الكراهية، فصل فى البيع، سعيد)

ولا يجوز قبول هدية أمراء الجور لأن الغالب في مالهم الحرمة إلا إذا علم أن أكثر ماله حلال بأن كان صاحب تجارة أو زرع فلا بأس به لأن أموال الناس لا تخلو عن قليل حرام فالمعتبر الغالب، وكذا أكل طعامهم كذا فى الاختيار شرح المختار. (الفتاوى الهندية: ٥/٣٤٢)

Yes, if it is not known with certainty whether the wealth is haram, mixed with other wealth or the major income is lawful; it will be permissible to accept the gift.

After quoting juridical texts, Hadrat Maulānā Zafar Ahmad Thānwī rahimahullāh writes:

We learn from these texts that the person whose income is mixed with lawful and unlawful, the majority is taken into consideration. If the major portion of his income is lawful, it is permissible to accept his gifts and hospitality. But if it is known with certainty that a certain gift or food is mixed with unlawful, it will be forbidden to accept it, and also forbidden to eat it. However, Imām Abū Hanīfah rahimahullāh says that it is mixed up and consumed, so there is leeway according to him. This will be made clear from some of the narrations. If the major portion of a person's income is unlawful, it will be forbidden to accept his gifts and hospitality. Yes, if he informs you that a certain gift or food is lawful, it will be permissible to accept it.[1]

Further reading: *Shāmī*, vol. 5, p. 98; *Imdād al-Ahkām*, vol. 4, p. 397-400; *Fatāwā 'Uthmānī*, vol. 3, p. 395.

If a non-Muslim receives interest wealth, he will become its owner and it will be permissible to accept a gift from him as long as he does not commit something which is rationally forbidden and reprehensible, e.g. treachery, stealing, hijacking, etc. Non-Muslims living in an Islamic country will not be permitted to engage in interest transactions.

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[1] *Imdād al-Ahkām*, vol. 4, p. 399.

The fundamental basis in this regard is whether non-Muslims are addressees for subsidiary matters of Islam or not. The jurists differ in this regard. Some scholars say that initially they are only addressed for īmān and punishments; and not transactions. Other scholars say that non-Muslims are addressed for transactions as well. No matter what, the point which comes out clear is that non-Muslims become owners of interest wealth.

Detailed proofs can be found in the chapter on usury and interest.

Allāh taʿālā knows best.

A leeway for making hibatul mashghūl lawful

<u>Question</u>

Zayd has a large house containing twelve rooms. The house is filled with goods. It has a large library, freezers, fridges, several large machines, gym equipment, beds, carpets, kitchen equipment, etc. Zayd has three sons, two of whom have their own houses while one doesn't. The latter lives with his father and serves him. He is also an ʿālim. Zayd wants to give the house to this son who is an ʿālim, but not the goods which it contains. Zayd feels it will be better if the goods are distributed among all the heirs after his demise, and he wants to use them while he is alive. Zayd is himself an ʿālim. He knows that if he wants to give the house to his son, he will have to give him control and possession of it. And for this, it will be necessary for him to empty the house. Emptying the house is quite a mission. What stratagem can Zayd resort to whereby he can give the house over to his son while saving himself from the burden of emptying the house? Zayd teaches *Hidāyah* and he knows that he will have to empty the house.

<u>Answer</u>

Zayd is correct in thinking that he will have to empty the house if he wants to give over control of it. However, the jurists have noted a simple stratagem for it. This simplifies the issue. He must place all the goods of the house as a trust/safekeeping to the one whom he wants to give the house, and give him control over it. He must then give the house to him and also give him control over it. In other words, he must give him the keys to the house while he must leave the house. He can then take the goods which he gave for safekeeping whenever he wants.

الحيلة فی ہبة المشغول ہی أن یودع المال الشاغل للموہوب لہ ویسلم إلیہ أولاً ثم تسلم الدار إلیہ وفی ہذا تکون الہبة والتسلیم صحیحین. (درر الحکام شرح مجلة الاحکام: ٢/٣٩٦، بیروت)

ولو وہب داراً فیہا متاع للواہب وسلم الدار إلیہ وسلمہا مع المتاع لم یصح لأن الدار مشغولة بالمتاع والفراغ شرط لصحة التسلیم والحیلة فیہ أن یودع المتاع أولاً عند الموہوب لہ ویخلی بینہ وبینہ ثم یسلم الدار إلیہ فیصح لأنہا مشغولة بمتاع ہو فی یدہ. (الجوہرة النیرة: ٢/١١، کتاب الہبة، مکتبہ امدادیہ، ملتان)

وکذا فی حاشیة الطحطاوی علی الدر المختار: (٣/٣٩٥، کوئتہ)، وغمز عیون البصائر شرح الاشباہ والنظائر: (٢/٣٤٢، نقلاً عن الجوہرة)

Allāh taʿālā knows best.

RENTING AND HIRING

Definition of ijārah

<u>Question</u>

What is the definition of an ijārah contract? What is the ruling with regard to ignorance about the ijārah period? What is the ruling with regard to an ijārah agreement with a non-Muslim?

<u>Answer</u>

1. Definition of ijārah

Ijārah refers to a specified recompense in exchange for a known benefit. In other words, ijārah refers to one party offering a benefit while the other party pays something in exchange for it. For example, one person has a house which he permits another to live in. The other person pays rent for it. This will be called an ijārah.

وفى الهداية: الإجارة عقد يرد على المنافع بعوض. (الهداية: ٣/٢٩٣، كتاب الاجارات)

وفي شرح المجلة: الإجارة فى اللغة بمعنى الأجرة وقد استعملت فى معنى الإيجار أيضاً... وفي اصطلاح الفقهاء بمعنى بيع المنفعة المعلومة فى مقابلة عوض معلوم الخ. (شرح المجلة لمحمد الاتاسى: ٢/ ٤٧٢ المادة: ٤٠٥)

2. Specifying a period for ijārah

It is necessary to specify a period for ijārah. Ignorance of the period which could lead to a dispute renders the contract invalid. Yes, where it is does not lead to dispute, it will not invalidate the contract.

ومنها بيان المدة في إجارة الدور والمنازل والبيوت والحوانيت وفي استئجار الظئر لأن المعقود عليه لا يصير معلوم القدر بدونه فترك بيانه يفضي إلى المنازعة، وسواء قصرت المدة أو طالت من يوم أو شهر أو سنة أو أكثر من ذلك بعد أن كانت معلومة وهو أظهر أقوال الشافعي... وسواء عين اليوم أو الشهر أو

السنة أو لم يعين، ويتعين الزمان الذي يعقب العقد لثبوت حكمه الخ. (بدائع الصنائع: ٤/١٨١، سعيد)

وفى الدر المختار: (يفسدها) كجهالة مأجورة أو أجرة أو مدة... وفى الشامية: قوله أو مدة، إلا فيما استثنى، قال فى البزازية: إجارة السمسار والمنادى والحمامى والصكاك وما لا يقدر فيه الوقت ولا العمل تجوز لما كان للناس به حاجة ويطيب الأجر المأخوذ لو قدر أجر المثل، وذكر أصلاً يستخرج منه كثير من المسائل. (الدر المختار مع رد المحتار: ٦/٤٦، باب الاجارة الفاسدة، سعيد)

وفي تقريرات الرافعي: قوله وذكر أصلاً يستخرج منه كثير من المسائل) هو أنه إذا استاجر إنساناً على عمل لو رام الأجير الشروع فيه حالاً قدر عليه صحت الإجارة ذكر له وقتاً أو لا كالإجارة على خبز عشرين مناً من الدقيق والآلات كالدقيق ونحوه في ملك المستاجر وإن لم يذكر مقدار العمل لكن ذكر الوقت نحو أن يقول استاجرتك لتخبز لي اليوم إلى الليل يجوز أيضاً لأن المنفعة تصير معلومة بذكر الوقت أيضاً وكذا لو قال: أصلح هذا الجدار بهذا الدرهم يجوز وإن لم يذكر الوقت لأنه يمكن له الشروع فى العمل حالاً. (التحرير المختار: ٦/٢٦٤، سعيد. وكذا فى الفتاوى البزازية على هامش الهندية: ٥/٤٠)

وفي الفقه الحنفي وأدلته: وكل جهالة تفسد البيع تفسد الإجارة من جهالة المعقود عليه، أو الأجرة أو المدة، لما عرف أن الجهالة مفضية إلى المنازعة. (الفقه الحنفى وادلته: ٢/٩٠، كتاب الاجارة، بيروت)

Further details with regard to ignorance of the ijārah period were given in Kitāb al-Buyū'.

3. An ijārah contract with a non-Muslim

It is permissible to enter into an ijārah contract with a non-Muslim. The prerequisites for an ijārah contract do not contain the prerequisite of Islam.

وأما شرائطها فأنواع... وإسلامه ليس بشرط أصلاً فتجوز الإجارة والاستئجار من المسلم والذمي والحربي والمستامن الخ. (الفتاوى الهندية: ٤/٤١٠، كتاب الاجارة)

بدائع الصنائع:

وأما إسلام العاقد فليس بشرط فيصح من المسلم والكافر والحربى المستامن كما يصح البيع منهم. (بدائع الصنائع: ٤/١٧٩، سعيد)

Allāh taʿālā knows best.

Renting for a period of one hundred years

Question

Is it permissible for a person to rent a house, shop or land for one hundred years?

Answer

The jurists differ in this regard. Some say that this rental ijārah is impermissible, while others say it is permissible. The latter view is the preferred one. Based on this, in the case under question, it is permissible to rent a house, shop or land for one hundred years.

فالمذهب عندنا أنه إذا استاجرها مدة معلومة صح الاستئجار طالت أو قصرت، إلى قوله... وقد دل على جواز الاستئجار أكثر من سنة قوله تعالىٰ: على أن تأجرني ثماني حجج فإن أتممت عشراً فمن عندك. (سورة القصص، الآية: ٢٧) ولأن كل مدة تصلح أجلاً للبيع فإنها تصلح مشروطة في عقد الإجارة كالسنة وما دونها والمضى فيه وهو أن الشرط الإعلام فيها على وجه لا يبقى بينهما منازعة. (المبسوط: ١٥/١٣٢، دار الفكر)

فتصح على مدة معلومة أي مدة كانت لأن المدة إذا كانت معلومة كان قدر المنفعة فيها معلوماً فأفاد أنها تجوز ولو كانت المدة لا يعيش إلى مثلها عادة واختاره الخصاف ومنعه بعضهم. (البحر الرائق: ٧/٢٩٩، كوئته)

ومنها بيان المدة في إجارة الدور والمنازل والبيوت والحوانيت... وسواء قصرت المدة أو طالت من يوم أو شهر أو سنة أو أكثر من ذلک بعد أن كانت معلومة... لأن المانع إن كان ہو الجهالة فلا جهالة وإن كان عدم الحاجة فالحاجة قد تدعو إلى ذلک. (بدائع الصنائع: ٤/١٨١، سعيد)

وفی الشامية: قولہ ببيان المدة لأنها إذا كانت معلومة كان قدر المنفعة معلوماً قولہ وإن طالت أی ولو كانت لا يعيشان إلى مثلها عادة، واختاره الخصاف، ومنعہ بعضہم، بحر، وظاہر إطلاق المتون ترجيح الأول. (فتاوی الشامی: ٦/٦، كتاب الاجارة، سعيد)

شرح المجلة:

للمالک أن يوجر مالہ وملکہ لغيره مدة معلومة قصيرة كانت كيوم أو طويلة كسنين، أو أكثر حتى لو آجرہا إلى مدة لا يعيش العاقدان إلى مثلها عادةً جاز واختاره الخصاف ومنعہ بعضہم وظاہر إطلاق المتون ترجيح الأول. (شرح المجلة لسليم رستم باز اللبنانی، ١/٢٧١، المادة: ٤٨٤)

ʿIṯr Hidāyah:

Whether an ijārah is for one hundred or five hundred years, or any other lengthy period (in which both parties will not normally be alive), it is permissible according to certain jurists.[1]

Allāh taʿālā knows best.

Giving books on rent

Question

Is it permissible for a person to hire out books for the sake of reading?

Answer

ʿAllāmah Shāmī rahimahullāh and others say that it is not permissible to take books on rent. However, Shaykh al-Islām Qādī al-Qudāt

[1] *ʿIṯr Hidāyah*, p. 423.

ʿAllāmah Abul Hasan Saghdī rahimahullāh (d. 461 A.H.) states that it is permissible. If books are placed in one's house or under one's control, and given on rent to retain the wealth of others, then it ought to be permissible. Furthermore, in our times, it is quite normal for people to take books on rent. This is why it ought to be permissible.

ويجوز في قول الشيخ الإجارة في مصاحف القرآن والفقه ليقرأ فيها أو لينسخها إذا احتاج إلى ذلك. (النتف فى الفتاوىٰ، ص ٣٤٨، كتاب الاجارة، دار الكتب العلمية، بيروت)

Ahsan al-Fatāwā:

The copy of the person who wrote a book is its author. It has become quite common to hire it out. He may take a payment from traders for a few copies.[1]

Some scholars classified it as impermissible because it was not common practice. Ibn Nujaym Misrī rahimahullāh writes:

ولا يجوز استئجار كتب الفقه والتفسير والحديث لعدم التعارف. (البحر الرائق: ٨/٢٠، كوئته)

بدائع الصنائع:

لأن جوازها (الإجارة) ثبت على خلاف القياس لتعامل الناس فما لم يتعاملوا فيه لا يصح فيه الإجارة ولهذا لم تصح إجارة الأشجار لتجفيف الثياب و إجارة الأوتاد لتعليق الأشياء عليها وإجارة الكتب للقراءة ونحو ذلك. (بدائع الصنائع: ٥/١٧٣، سعيد)

However, in our times, it has become common practice to take and give books on rent. Hadrat Muftī Rashīd Ahmad Ludhyānwī rahimahullāh has noted this. Injunctions do change with a change in societal norms and habits.

والعرف فى الشرع له اعتبار لذا عليه الحكم قد يدار.

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[1] *Ahsan al-Fatāwā*, vol. 7, p. 317.

ما رأه المسلمون حسناً فهو عند الله حسن، واعلم أن اعتبار العادة والعرف رجع إليه في مسائل كثيرة حتى جعلوا ذلك أصلاً فقالوا: تترك الحقيقة بدلالة الاستعمال والعادة... وفي شرح البيري عن المبسوط الثابت بالعرف كالثابت بالنص، ثم اعلم أن كثيراً من الأحكام التي نص عليها المجتهد صاحب المذهب بناء على ما كان في عرفه وزمانه قد تغيرت بتغير الأزمان بسبب فساد أهل الزمان أو عموم الضرورة. (شرح عقود رسم المفتى، ص ٣٧)

Allāh taʿālā knows best.

When either one of the parties passes away

Question

A person rented a shop for twenty years but either of the two parties – the landlord or the tenant – passed away sometime in between. The contract has terminated according to the Sharīʿah but not according to the law of the land. After the tenant passes away, someone else will ask for an annulment of the contract on the basis of the Sharīʿah, but the law is an obstacle. How, then, could we continue the rental contract according to the Sharīʿah?

Answer

If, in the rental contract, the landlord and the tenant state that if either of the two parties passes away, then the contract will still be valid until the end of the specified period, then it will remain valid even with the passing away of either one. In other words, the contract will continue based on the agreement.

وتنفسخ بلا حاجة إلى الفسخ بموت أحد عاقدين عندنا... إلا لضرورة كموته في طريق مكة ولا حاكم فى الطريق فتبقى إلى مكة. وفى الشامية: قوله إلا لضرورة قال فى الدر المنتقى، وقد تقرر استثناء الضروريات، فمن الظن أنه ينتقض بموت المزارع أو المكارى في طريق مكة فإنه لا ينفسخ حتى يبلغ مأمنا، لأن الإجارة كما تنتقض بالأعذار تبقى بالأعذار فليحفظ. (الدر المختار على رد المحتار: ٨٤،٦/٨٣، سعيد)

وفي تقريرات الرافعي: قوله فمن الظن أنه ينتقض بموت المزارع الخ. أى فيما إذا استاجر أرضاً فزرع فيها ثم مات قبل انقضاء المدة كان على ورثته ما سمى من الأجر إلى أن يدرک الزرع كما فى الهندية. (التحرير المختار: ٦/٢٧١، باب فسخ الاجارة، سعيد)

<u>شرح المجلة:</u>

لو انفسخت الإجارة بموت أحد العاقدين قبل إدراک الزرع، فإنه يترک بالمسمىٰ على حاله إلى الحصاد استحساناً. (شرح المجلة، المادة: ٥٢٦، ٢/٦١٦، لمحمد خالد الاتاسی)

وتنفسخ الإجارة أيضاً بلا حاجة إلى الفسخ بموت أحد عاقدين عقدها لنفسه (تنوير) لنفسه إلا لضرورة كما لو مات موجر السفينة في وسط البحر أو مات موجر الدابة فى الطريق فإنها لا تنفسخ حتى يبلغ مأمناً لأن الإجارة كما تنقض بالأعذار تبقى بالأعذار (در منتقى). (شرح المجلة لسليم رستم باز اللبنانى: ١/٢٥١، المادة: ٤٤٣)

'Itr Hidāyah:

Whether an ijārah is for one hundred or five hundred years, or any other lengthy period (in which both parties will not normally be alive), it is permissible according to certain jurists. However, as per the statement of the jurists – وتنفسخ الإجارة بموت أحد المتعاقدين (شرح الوقاية) – this lengthy rental contract will be automatically annulled with the death of either party. Yes, where it is stated in the contract (by the explicit order of the contract and not by its tacit order), then according to the deduction of my honourable father, the death of either of the party will not render the contract annulled until the end of the specified period. (My honourable father writes in *Takmilah 'Umdah ar-Ri'āyah 'Alā al-Jild ath-Thālith Min Sharh al-Wiqāyah*):

وأما قول فقهائنا في هذا كله صحيح على محله لأن العقد صار على شرف الفسخ إلا أن يمنعه مانع كالجهل أو العهد أو الضرر فما قلنا قلنا بحكم العهد وعدم

إضرار العاقدين وما قالوا قالوا ما كان مقتضى العقد فتجويز المعارضة بين فقهائنا وبين رأينا الغالب فيه الخطأ مجادلة باطلة بل إنا استنبطنا من هداياتهم وإفاداتهم فانظر. (تكملة عمدة الرعاية: ٣/٣١١، باب فسخ الاجارة، رقم الحاشية: ٤)

Although my father's deduction is based on the jurists' principle of "annulment due to the death of one of the parties" and is correct by the order of:

الضرورة تبيح المحظورات وأن الإجارة تنتقص بالأعذار تبقى بالأعذار (شامي ج ٥، ص ٥٦، بحواله در منتقى).

Need and valid reasons enable exclusions, and difference in injunctions related to contracts and covenants, and other parallel principles; his deduction is not textual.[1]

قوله طالت الخ... والإجارات تنفسخ بالموت وكذلك إن شرط الدوام كمن يقول آجرتك أرضي هذا الدوام على أن تعطيني كل شهر كذا لأن فيه معنى تمليك العين أو الإجارة بعد موت وذا لا يجوز نعم إذا شرط مثل هذه الأمور معاهدة ومواعدة لا بأس به لأن العهود غير العقود والعقود تتبع الوجود دون العهود فتنبه. (تكملة عمدة الرعاية: ٣/٢٩٠، رقم الحاشية: ١٨)

Allāh taʿālā knows best.

Repairs to a rented house

Question

A few people took a house on rent. The tenants made some alterations to the house after obtaining the landlord's permission. For example, a door was moved to the other side. However, it was agreed from before hand that before returning the house to the owner, they will restore the house to its original condition at their cost. The tenants moved from the house in October, but their goods are still in the house. The keys to the house are also with them. It was agreed that they will

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[1] *ʿIṭr Hidāyah*, p. 423.

return the house in December and will also pay the rent until December. A promise was made to restore the house. However, acting under the order of the owner, the tenants emptied the house in November. The owner then changed the locks to the house. In other words, he took complete control of the house and said to the tenants: "I will personally do the repairs to the house and you will have to pay for them."

My questions are:

1. Is the tenant liable for the repairs of the entire house or only for those things which he changed?
2. If the owner does the repairs and then asks for payment for the repairs, what value will be considered – an average value or high value?
3. Is the tenant liable for the rental for December? Bearing in mind that the house is under the landlord's control since November.

Answer

On the condition that the above question is correct, the answers are as follows:

1. The tenant is liable to restore and correct whatever changes he made to the house. This is because he had agreed to it and had made the changes for his convenience and benefit. There was no benefit for the owner. Apart from this, the tenant is not liable for the repairs and renovation of the house. This is the owner's responsibility.

2. If the owner did the repairs himself and asks for the price, the tenant is liable only for the payment for the changes which he made. The tenant is not liable for other repairs such as repairing the roof, etc. When paying the value, the tenant will have to pay the average market rate. It is not obligatory on him to pay the higher price.

3. The owner took control of the house in December, so the rental for December is not obligatory on the tenant.

وعمارة الدار المستاجرة وتطيينها وإصلاح الميزاب وما كان من البناء على رب الدار، وكذا ما يخل بالسكنیٰ. (الدر المختار: ٦/٧٩، باب فسخ الاجارة، سعيد)

شرح المجلة:

أقول: إصلاح ما كان من البناء متى كان تركه مخلاً بالسكنى يجب على المالك بلا فرق بين السطح والجدران... وفى الهندية عن البدائع: وإصلاح بئر الماء والبالوعة والمخرج على رب الدار، ولا يجبر على ذلك وإن كان امتلأ من فعل المستاجر، وقالوا: فى المستاجر إذا انقضت مدة الإجارة وفى الدار تراب من كنسه، فعليه أن يرفعه لأنه حدث بفعله فصار كتراب وضعه فيها، وإن كان امتلأ خلاؤها ومجاريها من فعله، فالقياس أن يكون عليه نقله، لأنه حدث بفعله فيلزمه نقله كالكناسة والرماد، إلا أنهم استحسنوا وجعلوا نقل ذلك على صاحب الدار للعرف والعادة بين الناس أن ما كان مغيباً فى الأرض فنقله على صاحب الدار، فحملوا ذلك على العادة، وإن أصلح المستاجر شيئاً من ذلك لم يحتسب له بما أنفق وكان متبرعاً... وفى الأنقروية عن البزازية: خرج المستاجر من البيت وفيه تراب ظاهر أو رماد، على المستاجر إخراجه، بخلاف البالوعة، فإنه يلزم المؤجر تفريغها استحساناً، وإن شرط على المستاجر عند العقد جاز، وأنه موافق للعقد، أى وإن كان العرف بخلافه، لأنه حدث بفعله، فالشرط الموافق للقياس وإن كان مخالفاً للعرف، لا يفسد العقد، تأمل. (شرح المجلة للاتاسى: ٢/٦٢٢، المادة: ٥٢٩)

يلزم مراعاة الشرط بقدر الإمكان، أى إمكان الشرط واستطاعته، ولا يلزم ما فوق الاستطاعة... أن الشروط ثلاثة أقسام: قسم يجوز شرعاً، فيه فائدة لمن اشترطه، فهذا يلزم مراعاته... وقال فى البدائع من كتاب المضاربة: الأصل فى الشروط اعتبارها ما أمكن، وإذا كان القيد مفيداً كان ممكن الاعتبار فيعتبر لقوله عليه الصلاة والسلام: المسلمون عند شروطهم. (شرح المجلة للاتاسى: ١/٢٣٦، المادة: ٨٣)

وفيه أيضاً: لا يلزم المستاجر إطعام الأجير إلا أن يكون العرف فى البلدة كذلك، حتى لو كان ذلك متعارفاً لا يكون اشتراطه على المستاجر مفسداً للعقد على ما قاله الفقيه أبو الليث، كما فى الحموى على الأشباه، قال في رد المحتار: ثم ظاهر كلام الفقيه أنه لو تعورف ذلك في علف الدابة يجوز، تأمل، والظاهر أنه يلزم المستاجر حينئذٍ أن يطعمه من أوسط الطعام. (شرح المجلة للاتاسى: ٢/٦٧٥، المادة: ٥٧٦)

وفيه أيضاً: تلزم الأجرة أيضاً فى الإجارة الصحيحة بالاقتدار على استيفاء المنفعة، مثلاً لو استاجر أحد داراً بإجارة صحيحة فبعد قبضها يلزمه إعطاء الأجرة وإن لم يسكنها. ولا بد لهذه المسألة من قيدين آخرين: أحدهما أن يكون التمكن من استيفاء المنفعة فى المدة التي ورد عليها العقد ...قال فى الهندية: فأما إذا لم يتمكن من الاستيفاء أصلاً ... لا يجب الأجر... واستفيد من لفظ الاقتدار أنه لو منعه المالك ...لا تجب الأجرة، كما صرح به في رد المحتار عن النهاية. (شرح المجلة للاتاسى: ٢/٥٥٤، المادة: ٤٧١)

Allāh ta'ālā knows best.

A Muslim engineer constructing a liquor house

Question

Is it permissible for a Muslim engineer to accept the job of constructing a liquor house?

Answer

The Hanafī jurists differ in this regard. Imām Muhammad and Imām Abū Yūsuf rahimahumallāh say that it entails "aiding in sin". A person should therefore abstain from such labour. Imām Abū Hanīfah rahimahullāh says that there is no sin whatsoever in the job which the person is doing. It is therefore permissible. Nonetheless, caution demands that a person abstains. If a person does accept a job of this nature, his pay and income will not be harām.

الدر المختار:

وجاز تعمير كنيسة وحمل خمر ذمي بنفسه أو دابته بأجر لا عصرها لقيام المعصية بعينه... وقالا: لا ينبغي ذلك لأنه إعانة على المعصية وبه قالت الثلاثة. وفي الشامية: قوله وجاز تعمير كنيسة قال في الخانية: ولو آجر نفسه ليعمل في الكنيسة ويعمرها لا بأس به لأنه لا معصية في عين العمل، قوله وحمل خمر ذمي قال الزيلعي: وهذا عنده وقالا: هو مكروه... وله أن الإجارة على الحمل وهو ليس بمعصية، ولا سبب لها وإنما تحصل المعصية بفعل فاعل مختار. (الدر المختار مع فتاوى الشامي، ج ٦، ص ٣٩١).

حاشية الطحطاوى:

قولہ وجاز تعمير كنيسة أى بالترميم لا بالإعادة بعد الهدم وظاہرہ جوازہ وأنہم لو استامروا الإمام أمرہم وأنہ يجوز للمسلم أن يوجر نفسہ لذلک. (حاشية الطحطاوى على الدر المختار: ٤/١٩٦، كوئتہ)

البحر الرائق:

وفى التاتارخانية: ولو آجر المسلم نفسہ لذمي ليعمل فى الكنيسة فلا بأس بہ. (البحر الرائق: ٨/٢٠٣، فصل فى البيع، كوئتة)

المحيط البرهانى:

ولو آجر نفسہ ليعمل فى الكنيسة يعمرہا فلا بأس بہ، إذ ليس فى نفس العمل معصية. (المحيط البراہانى: ٦/١٠٣، الفصل السادس عشر فى معاملة اہل الذمة، مكتبہ رشيدية)

الفتاوى الهندية:

ولو استاجر الذمي مسلماً ليبني له بيعة أو كنيسة جاز ويطيب له الأجر. (الفتاوى الهندية: ٤/٤٥٠، وكذا فى فتاوى قاضيخان على هامش الهندية: ٢/٣٢٤. والفتاوى البزازية على هامش الهندية: ٥/١٢٥. وجواهر الفقه: ٢/٤٥٣، مسئلة الاعانة على الحرام. وامداد الفتاوىٰ: ٤/٣٢٢)

Allāh taʿālā knows best.

Constructing places of worship for non-Muslims

Question

A Buddhist place of worship is being constructed in a certain place. Can a Muslim take employment for its construction? Will his income be lawful?

Answer

There is leeway for Muslims to work in the construction of places of worship of non-Muslims. Based on this, the income will not be harām.

قوله وجاز تعمير كنيسة أى بالترميم لا بالإعادة بعد الهدم وظاهره جوازه وأنهم لو استامروا الإمام أمرهم وأنه يجوز للمسلم أن يوجر نفسه لذلك. (حاشية الطحطاوى على الدر المختار: ٤/١٩٦، كوئته)

البحرالرائق:

وفى التاتارخانية: ولو آجر المسلم نفسه لذمي ليعمل فى الكنيسة فلا بأس به. (البحر الرائق: ٨/٢٠٣، فصل فى البيع، كوئتة)

المحيط البرهانى:

ولو آجر نفسه ليعمل فى الكنيسة يعمرها فلا بأ س به، إذ ليس فى نفس العمل معصية. (المحيط البراهانى: ٦/١٠٣، الفصل السادس عشر فى معاملة اهل الذمة، مكتبه رشيدية)

(وكذا فى فتاوى قاضيخان على هامش الهندية: ٢/٣٢٤. والفتاوى البزازية على هامش الهندية: ٥/١٢٥)

Allāh taʿālā knows best.

A Muslim barber cutting hair in un-Islamic ways

Question

What is the ruling with regard to the income of a Muslim barber who cuts the hair of a Muslim in an un-Islamic way or shaves his beard?

Answer

It is obligatory to keep the beard to a length of one fist. To trim the beard or have it trimmed by someone to a length which is less than one fist is a sinful act according to the Sharīʿah. Based on this, it is impermissible for a Muslim barber to make it his occupation to cut hair in an un-Islamic way or to shave the beard. His income is also impermissible. It is necessary for him to repent from this sin.

والأخذ من اللحية وهو دون ذلك (القبضة) كما يفعله بعض المغاربة، ومخنثة الرجال لم يبحه أحد، وأخذ كلها فعل يهود الهند، ومجوس الأعاجم. (حاشية الطحطاوى على مراقى الفلاح، ص ٦٨١، كتاب الصوم، فصل فيما يكره للصائم، قديمى. وكذا فى فتاوى الشامى: ٢/٤١٨، كتاب الصوم، مطلب فى الاخذ من اللحية، سعيد. وفتح القدير: ٢/٣٤٨، دار الفكر)

لا يحل للرجل أن يقطع اللحية. (الفتاوى البزازية على هامش الهندية: ٦/٣٧٩، كتاب الاستحسان)

Jawāhir al-Fiqh:

The scholars concur that it is harām to shave off the beard. It is also harām to trim it less than one fist length. All four Imāms – Hanafīs, Mālikīs, Shāfiʿīs and Hambalīs – concur in this regard.

ويحرم على الرجل قطع لحيته الخ، وأما الأخذ منها وهي ما دون القبضة كما يفعله بعض المغاربة ومخنثة الرجال فلم يبحه أحد. (فتح القدير ودر مختار). (جواهرالفقه: ٢/٤٢٣)

Fatāwā Mahmūdīyyah:

It is impermissible to shave the beard...it is sinful to do this and the income from it is makrūh.[1]

Āp Ke Masā'il:

Payment received for a harām action is also harām.[2]

Jadīd Masā'il Ke Shar'ī Ahkām:

Let it be clear that it is harām for you to shave off your beard or to trim it less than one fist length. In the same way, it is harām to shave another person's beard or trim it less than one fist length. It is also harām to collect payment for shaving a beard. Those who are barbers should not make their income harām.

ومن آفات اليد حلق راس المرأة ولحية الرجل وقص أقل من قبضة ولو بإذن منه لأنه إعانة على معصية فيكون معصية أيضاً. (شرح الطريقة المحمدية: ٣/٤٤٧)

One of the sins of the hands is to shave off the hair of a woman's head, shave off the beard of a man or to trim it less than one fist in length. This applies even if this shaving or trimming is done by the permission of the man or woman. Aiding in sin is a sin in itself.

It is stated in *Kashshāf al-Qanā'* that it is harām to pay for having one's beard shaven or to accept payment for such a service. (*Kashshāf al-Qanā'*, vol. 4, p. 9)[3]

Allāh ta'ālā knows best.

Taking a payment for delivering a lecture

Question

Is it permissible to take a payment for delivering a lecture?

Answer

From the statements of the jurists we gauge that it is permissible to take a payment for delivering a lecture. However, our seniors disliked

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[1] *Fatāwā Mahmūdīyyah*, vol. 17, p. 123.

[2] *Āp Ke Masā'il*, vol. 6, p. 40.

[3] *Jadīd Mu'āmalāt Ke Shar'ī Ahkām*, vol. 1, p. 202.

it. There is no question to its permissibility, but it is disliked. Yes, if a lecturer has freed himself solely for delivering lectures, there is nothing wrong whatsoever for him to take a payment.

ويفتى اليوم بصحتها لتعليم القرآن والفقه والإمامة والأذان. وفى الشامية: وزاد بعضهم الأذان والإقامة والوعظ. (الدر المختار مع رد المحتار: ٦/٥٥، مطلب تحريرمهم فى عدم جواز الاستئجار على التلاوة، سعيد)

الفتاوى الهندية:

وفى الأصل لا يجوز الاستئجار على الطاعات كتعليم القرآن والفقه والأذان والتذكير والتدريس والحج والعمرة ولا يجب الأجر،كذا فى الخلاصة ومشايخ بلخ جوزوا... والمختار للفتوىٰ في زماننا قول هؤلاء كذا فى الفتاوى العتابية. (الفتاوى الهندية: ٤/٤٤٨)

وفى البزازية: الاستئجار على الطاعات كتعليم القرآن والفقه والتدريس والوعظ لا يجوز أى لا يجب الأجر وأهل المدينة طيب الله ساكنها جوزه قال فى المحيط وفتوىٰ مشايخ بلخ على الجواز قال الإمام الفضلى والمتأخرون على جوازه. (الفتاوى البزازية: ٢/٣٧)

ولا يجوز أخذ الأجرة عند المتقدمين على الطاعات و فى شرح الوافى والمذهب عندنا أن كل طاعة يختص بها المسلم فالاستيجار عليها باطل كالأذان والحج والإمامة والتذكير والتدليس... ويفتى اليوم بالجواز ...كما في عامة المعتبرات وهذا على مذهب المتأخرين من مشايخ بلخ استحسنوا ذلك وقالوا: الأحكام قد تختلف باختلاف الزمان ألا يرى أن النساء كن يخرجن إلى الجماعات في زمانه عليه الصلاة والسلام وفي زمان أبي بكر الصديق رضي الله عنه حتى منعهن عمر رضي الله عنه واستقر الأمر عليه وكان ذلك هو الصواب. (مجمع الانهر شرح ملتقى الابحر: ٢/٣٨٢)

Fatāwā Mahmūdīyyah:

Just as it is permissible to be employed as a teacher, it is permissible to be employed as a lecturer and speaker. The task must be specified. For example, it will be binding to deliver a one-hour lecture daily or a two-hour lecture every Friday, and this is the amount which you will receive as payment. Alternatively, a lecturer can be hired solely for delivering lectures. He will have to deliver lectures when invited to gatherings, or he must go on his own to deliver lectures in different venues.

It is undesirable for a person to deliver a lecture in one place and then take a payment for it. And if he receives less than what he estimated, then he shows disapproval. The effect of the lecture is lost and the one who invites him will do so merely as a custom. Even before the lecturer is called, the person will say: "I had given him this amount of money and he was not happy with it. This is why we should not call him until we make arrangements to pay him more." Various other accusations will be made.[1]

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

Is it permissible to take a payment for delivering a lecture? Some ʿulamāʾ are of the view that it is included in payment for acts of obedience, and therefore impermissible. Other ʿulamāʾ say it is permissible. Hadrat Thānwī rahimahullāh reconciles both views by saying:

If a person gets employed for delivering lectures as one does for imāmat, then it is permissible to take a payment. If a person is not employed for this purpose, but lays down a condition of payment at the time of the lecture (i.e. a person is called to deliver a lecture and he lays down a condition of payment), then this is impermissible. Take the example of a person who is not employed as an imām, but it is the time of salāh and he is present in the masjid. He is asked to lead the congregation, and at exactly that time he asks for a payment. This is not permissible.[2]

Ahsan al-Fatāwā:

If a person is employed as a lecturer or he has freed himself for this job, it is permissible for him to take a payment for the lecture. If a

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[1] *Fatāwā Mahmūdīyyah*, vol. 17, p. 85.

[2] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, 213.

scholar is requested to deliver a lecture on a certain occasion, it is not permissible for him to take a payment for it.[1]

Yes, there is no objection to accepting a gift at such a time.

H̲ad̲rat Maulānā Rashīd Ah̲mad Gangohī S̲āh̲ib rah̲imahullāh writes:

The latter day jurists state that it is permissible to accept a payment for a lecture on the basis of necessity.[2]

Qāmūs al-Fiqh:

It is not permissible to take a payment for an incidental lecture or talk because no religious feature is affected negatively because of it, nor is there any fear of Dīn being wasted away. Yes, if a person is hired specifically for this job; and delivering lectures, talks, propagating, etc. has been made his responsibility and duty, it will be permissible for him to take a payment for it.[3]

Allāh taʿālā knows best.

Taking a payment for being a muftī and qād̲ī

Question

Can a muftī or qād̲ī lay down a fee for his work?

Answer

It is not permissible for a muftī or qād̲ī to take a payment for giving a ruling verbally. Yes, it is permissible for him to take a payment for a written verdict. If there are several muftīs in a city, then in the presence of the others, it is not necessary for one to give a ruling. Therefore, in such a situation, it will be permissible to take a payment for giving a ruling.

قلت: لكن في البزازية: كل ما يجب على القاضي والمفتي لا يحل لهما أخذ الأجر به كإنكاح صغير لأنه واجب عليه وكجواب المفتي بالقول، وأما بالكتابة فيجوز لهما على قدر كتبهما لأن الكتابة لا تلزمهما. (الدر المختار: ٧/٥٩، سعيد)

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[1] *Ah̲san al-Fatāwā*, vol. 7, p. 300.

[2] *Ta'līfāt Rashīdīyyah*, p. 418.

[3] *Qāmūs al-Fiqh*, vol. 1, p. 497.

أما المفتي فهل يجوز له أخذ الأجر على كتب الجواب؟ ذكر فى القنية راقماً لشرح ظهير: أنه يجوز له أخذ الأجر على كتبة الجواب بقدره، لأن الكتابة ليست عليه، لأن الواجب عليه الجواب إما باللسان وإما بالكتابة. فألحقته أيضاً، فقلت وبالله المستعان:

جوز للمفتي على كتب خطه - على قدره إذ ليس فى الكتب يحصر

وقال جلال الدين ابو المحامد حامد بن محمد فى كتاب السجلات: يجوز للقاضي أخذ الأجرة على كتبة المحاضر والسجلات، ونحوہا من الوثائق بمقدار أجر المثل، وذلک لأن القاضي إنما يجب عليه القضاء وإيصال الحق الى مستحقه فحسب، اما الكتابة فزيادة عمل، فيعمله للمقضى له، وعلى ہذا قالوا: لا بأس للمفتي أن يأخذ شيئاً على كتابة جواب الفتوىٰ، وذلک لأن الواجب على المفتى الجواب باللسان دون الكتابة بالبنان، ومع ہذا الكف عن ذلک أولىٰ حذراً عن القيل والقال، وصيانة لماء الوجه عن الابتذال. (شرح منظومة ابن وہبان: ١/٢٨٨، فصل من كتاب ادب القاضى، ط: الوقف المدنى، ديوبند)

(وہكذا فى الدر المختار مع رد المحتار: ٦/٩٢، مسائل شتى من كتاب الاجارة، سعيد. ولسان الحكام فى معرفة الاحكام لابن الشحنة الحنفى، ص ٢١٩، الفصل الاول فى آداب القضاء، دار الفكر)

وفي فتاوى الشامي: قوله يستحق القاضى الأجر الخ)... وفى المنح عن الزاہدى: ہذا إذا لم يكن له في بيت المال شيء، تأمل. (فتاوى الشامى: ٦/٩٢، مطلب فى اجرة صک القاضى والمفتى، سعيد)

وفى الدر المختار: وفى الصيرفية: حكم وطلب أجرة ليكتب شهادته جاز، وكذا المفتي لو فى البلدة غيره، وقيل مطلقاً لأن كتابته ليست بواجبة عليه، وفى الشامية: قوله وقيل مطلقاً أى ولو لم يكن فى البلدة غيره وہو ظاہر ما

مر فى المتن، ووجهہ ظاہر للتعليل المذكور. (الدر المختار مع فتاوى الشامى: ٦/٩٢، مطلب فى اجرة صك القاضى والمفتى، سعيد)

Allāh taʿālā knows best.

Renting a property to a bank

Question

Is it permissible to rent out one's property or building to a bank?

Answer

Outwardly, a banking institution's business is tainted by usury. However, nowadays, a bank has other types of transactions as well. In fact, a major portion of its business is to do with import/export payments, electricity and telephone bills, etc. Therefore, the income which one receives from renting a property to a bank will not be harām. Yes, it is better to abstain.

If the building was constructed according to a bank's specifications, it will be makrūh tahrīmī. If the rooms are not for the bank alone but for other offices, it will be makrūh tanzīhī.

ولا بأس بأن يواجر المسلم داراً من الذمي ليسكنها، فإن شرب فيها الخمر أو عبد فيها الصليب أو دخل فيها الخنازير لم يلحق المسلم فيہ إثم في شيء من ذلك لأنہ لم يواجرہا لذلك والمعصية في فعل المستاجر دون قصد رب الدار فلا إثم على رب الدار في ذلك. (المبسوط للامام السرخسى: ١٦/٣٠٩، بيروت)

رجل آجر بيتاً ليتخذ فيہ نار أو بيعة أو كنيسة أو يباع فيہ الخمر فلا باس بہ، وكذا كل موضع تعلقت المعصية بفعل فاعل مختار. (خلاصة الفتاوى: ٤/٤٧٦، كتاب الكراہية)

الدر المختار:

(وجاز إجارة بيت بسواد الكوفة) ...وخص سواد الكوفة، لأن غالب أہلہا أہل الذمة (ليتخذ بيت نار أو كنيسة أو بيعة أو يباع فيہ الخمر) وقالا: لا ينبغي ذلك لأنہ إعانة على المعصية وبہ قالت الثلاثة. وفى الشامية: قولہ وجاز إجارة

بيت الخ، ہذا عنده أيضاً لأن الإجارة على منفعة البيت، ولہذا يجب الأجر بمجرد التسليم، ولا معصية فيہ وإنما المعصية بفعل المستاجر وہو مختار فينقطع نسبتہ عنہ... والدليل عليہ لو آجره للسكنى جاز وہو لا بد لہ من عبادتہ فيہ... قال فى المنح:.. والمنقول في كثير من الفتاوى أنہ يكره وہو الذى عولنا عليہ فى المختصر، أقول: ہو صريح أيضاً في أنہ ليس مما تقوم المعصية بعينہ، ولذا كان ما فى الفتاوى مشكلاً كما مر عن النہر. (الدر المختار مع رد المحتار: ٦/٣٩٢، سعيد)

ثم السبب إن لم يكن محركاً وداعياً، بل موصولاً محضاً، وہو مع ذلک سبب قريب بحيث لا يحتاج في إقامة المعصية بہ إلى إحداث صنعة من الفاعل كبيع السلاح من أہل الفتنة، وبيع العصير ممن يتخذه خمراً... وإجارة البيت ممن يبيع فيہ الخمر أو يتخذہا كنيسة أو بيت نار وأمثالها، فكلہ مكروه تحريماً إن يعلم بہ البائع والآجر، من دون تصريح بہ باللسان، فإنہ إن لم يعلم كان معذوراً ...لكن الإعانة حقيقة ہي ما قامت المعصية بعين فعل المعين ولا يتحقق إلا بنية الإعانة أو التصريح بها أو تعينها في استعمال ہذا الشيء، بحيث لا يحتمل غير المعصية. (جواہر الفقہ: ٢/٤٥٣، مسئلة الاعانة على الحرام)

وفى الدر المختار: قلت: ...إن ما قامت المعصية بعينہ يكره بيعہ تحريماً وإلا فتنزيهاً فليحفظ توفيقاً. (الدر المختار: ٦/٣٩١، كتاب الحظر والاباحة، سعيد)

Fatāwā Khalīlīyyah:

It seems permissible to rent out a building for a bank office.[1]

Allāh taʿālā knows best.

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[1] *Fatāwā Khalīlīyyah*, vol. 1, p. 252.

Renting a property for a cinema and liquor house

Question

Is it permissible for a Muslim to give his property, building or land to a person who sells liquor? Where can he spend this rental income? What is the ruling with regard to the rental which he received in the past?

Answer

The Hanafī jurists differ on this issue. Imām Abū Hanīfah rahimahullāh is of the view that where there is a majority of non-Muslims, it is permissible to give out a property on rent for the sale of liquor, etc. It is also permissible to accept the income and payment for it. Imām Muhammad and Imām Abū Yūsuf rahimahumallāh say that it is makrūh.

ولو استأجر الذمي من مسلم بيتاً يبيع فيه الخمر جاز عند أبي حنيفة ولا بأس لمسلم أن يؤاجر داره من ذمي ليسكنها وإن شرب فيه الخمر. (فتاوى قاضيخان على هامش الهندية ٢/٣٢٤)

البحر الرائق:

و إجارة بيت ليتخذ بيت نار أو بيعة أو كنيسة أو يباع فيه خمر بالسواد وهذا قول الإمام، وقالا: يكره كل ذلك لقوله تعالىٰ: وتعاونوا على البر والتقوىٰ ولا تعاونوا على الإثم والعدوان. (البحر الرائق: ٨/٢٠٢، كوئته)

الفتاوى البزازية:

ولو آجر نفسه لحمل الخمر قال الإمام: لا يكره وعلى قولهما يكره، لأن التصرف فى الخمر حرام، وكذا كل موضع تعلقت المعصية بفعل فاعل مختار، كما إذا آجر منزله ليتخذ بيعة أو كنيسة أو بيت نار يطيب له. (الفتاوى البزازية على هامش الهندية: ٥/١٢٥، العاشر فى الحظر والاباحة)

Imām Muhammad and Imām Abū Yūsuf rahimahumallāh say it is makrūh because it entails aiding in sin. If it entails the sale of an item which is not a sin in itself but is an immediate cause of the sin, then it

will be makrūh tanzīhī. For example, if it is known for a fact that the syrup of grapes is going to be used for the production of wine.

بأنه لا تقوم المعصية بعينه بل بعد تغيره. (فتاوى الشامي، ج ٦، ص ١٩٢).

If it is an item with which the sin is intrinsically linked, e.g. alcohol, it will be makrūh tahrīmī. This is if the seller knows about it from before hand.

Imām Abū Hanīfah rahimahullāh says: The rental is received in exchange for the tenant deriving benefit from the property. Once the property has been given over to the tenant, he is liable pay the rental by the mere handing over. There is no sin in the actual rental contract. The sin is committed by the action of the tenant, and he has control over his actions. Therefore, it will be incorrect to attribute the sin to the landlord.

وله أن الإجارة على منفعة البيت ولهذا تجب الأجرة بمجرد التسليم ولا معصية فيه وإنما المعصية بفعل المستاجر وهو مختار فيه فقطع نسبة ذلک إلى المؤجر. (البحر الرائق: ٨/٢٠٢، كتاب الكراهية، كوئتة)

Ta'līfāt Rashīdīyyah:

Question: A property is given on rent to someone who sells alcohol and other unlawful items on it. Or, the tenant personally commits sins on that property which are prohibited by the Sharī'ah. Or, non-Muslims worship idols in it. Is it prohibited to give it out on rent? Is it included in "aiding in sin"?

Answer: Renting out a property to such people is impermissible according to Imām Muhammad and Imām Abū Yūsuf rahimahumallāh. It seems that it is permissible according to Imām Abū Hanīfah rahimahullāh because it is a wilful action by the tenant. However, the fatwā is issued on the verdict that it not be given to them because it entails aiding in sin.

لا تعاونوا على الإثم والعدوان.[1]

Kifāyatul Muftī:

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[1] *Ta'līfāt Rashīdīyyah*, p. 421.

If the seller of alcohol is not a Muslim and the majority of the people in that area are non-Muslims, it will be permissible to give the property on rent to a non-Muslim for the sake of selling alcohol.[1]

Ahsan al-Fatāwā:

I am of the view there is difference between a Muslim and a non-Muslim tenant. The texts of the jurists are with reference to non-Muslims. It seems preference is given to karāhat tanzīhīyyah, both rationally and traditionally. Where the tenant is a Muslim, then preference is given to karāhat tahrīmīyyah.[2]

Allāh taʿālā knows best.

Renting out liquor stores and cinemas in a shopping mall

Question

A shopping mall contains a single liquor outlet while the remaining shops sell various other items. Can a Muslim collect rent from it? About 80-90% of the income from the mall is lawful. About 10% is rented out by liquor outlets and cinemas. Is this 10% rental income lawful. Can a Muslim owner collect this rent?

Answer

Our Imāms differ on the issue of renting out a premises for liquor, cinema and other vices, and the income which is derived from it. Imām Muhammad and Imām Abū Yūsuf rahimahumallāh say that it is not correct because it entails aiding in sin. Imām Abū Hanīfah rahimahullāh say that such a rental contract is valid and it is permissible to accept its income because the rental contract is based on deriving benefit from the rented premises, and there is no sin in this. The sale of liquor is the sole action of the seller. The landlord did not ask the tenant to sell liquor. If it is known from before hand that the tenant will sell liquor, it will be makrūh tahrīmī to rent it out to him and will entail aiding in sin. If the shop was given for some other purpose, and subsequently the tenant starts selling liquor there, it will be makrūh tanzīhī.

ولا بأس بأن يواجر المسلم داراً من الذمي ليسكنها، فإن شرب فيها الخمر أو عبد فيها الصليب أو دخل فيها الخنازير لم يلحق المسلم فيه إثم في شيء من

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[1] *Kifāyatul Muftī*, vol. 7, p. 340.

[2] *Ahsan al-Fatāwā*, vol. 6, p. 546.

ذلک لأنہ لم یواجرہا لذلک والمعصیة في فعل المستاجر دون قصد رب الدار فلا إثم علی رب الدار في ذلک. (المبسوط للامام السرخسی: ١٦/٣٠٩، بیروت)

رجل آجر بیتاً لیتخذ فیہ نار أو بیعة أو کنیسة أو یباع فیہ الخمر فلا باس بہ، وکذا کل موضع تعلقت المعصیة بفعل فاعل مختار. (خلاصة الفتاوی: ٤/٤٧٦، کتاب الکراہیة)

(کذا فی الہدایة: ٣/٤٧٢، کتاب الکراہیة، والکفایة: ٨/٣. وفی العینی شرح الکنز: ٢/٣٨٤، وکذا فی الدر المختار مع رد المحتار: ٦/٣٩٢، سعید، وعزیز الفتاوی: ١/٦٣٨)

There are differences in the verdicts of the seniors.

Hadrat Maulānā Rashīd Ahmad Gangohī rahimahullāh writes:

Renting out a property to such people is impermissible according to Imām Muhammad and Imām Abū Yūsuf rahimahumallāh. It seems that it is permissible according to Imām Abū Hanīfah rahimahullāh... However, the fatwā is issued on the verdict that it not be given to them because it entails aiding in sin.

Hadrat Muftī Kifāyatullāh Sāhib rahimahullāh writes:

If the seller of alcohol is not a Muslim and the majority of the people in that area are non-Muslims, it will be permissible to give the property on rent to a non-Muslim for the sake of selling alcohol.[1]

Hadrat Maulānā Muftī Rashīd Ahmad Ludhyānwī rahimahullāh says that it is makrūh tanzīhī to rent out the premises to a non-Muslim, and makrūh tahrīmī to rent it to a Muslim.[2]

The text of Hadrat Maulānā Muftī Rashīd Ahmad Ludhyānwī rahimahullāh reconciles the views of the senior:

If the liquor store is run by a Muslim, the rental income must be given in charity. If it is run by a non-Muslim, there is room to practise on the view of Imām Abū Hanīfah rahimahullāh.

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[1] *Kifāyatul Muftī*, vol. 7, p. 340.

[2] *Ahsan al-Fatāwā*, vol. 6, p. 546.

Allāh ta'ālā knows best.

The issue of safqah fī safqah in an ijārah

Question

Zayd gave some fabric to a dyer which he had to dye for fifty rupees; and he did as asked. Alternatively, he gave the fabric to a tailor and asked him to sew a garment for two hundred rupees; and the tailor did as asked. This transaction seems to be permissible and this is how people normally transact. However, there is one juridical objection to it. Since the dye or cotton is provided by the dyer or tailor, it becomes safqah fī safqah because a sale plus an ijārah have both combined. The sale of a specific item and the sale of a benefit – this is safqah fī safqah. Another harm seems to be that ijārah entails destruction of the benefit while here we find destruction of the item. Kindly explain.

Answer

The jurists say that this is permissible on the basis of people commonly transacting in this way.

وفى الاستحسان يجوز للتعامل فيه فصار كصبغ الثوب وللتعامل جوزنا الاستصناع. (الهداية: ٣/٦١، باب بيع الفاسد)

فإن القياس لا يجوز استيجار الصباغ لصبغ الثوب لأن الإجارة عقد على المنافع لا الأعيان وفيه عقد على العين وهو الصبغ لا الصبغ وحده لكن جوز للتعامل جواز الاستصناع. (العناية مع فتح القدير: ٦/٨٥، مكتبه رشيديه)

Furthermore, it also entails safqah fī safqah because together with the ijārah, there is the sale of the dye, the cotton and other associated items. However, it is fundamentally an ijārah and secondarily a sale.

Hadrat Thānwī rahimahullāh writes:

Question: When the obvious meaning of نهى عن صفقة في صفقة is considered, certain transactions appear to be impermissible, whereas they are quite common among all sections of the community. For example:

(1) A person repairs a watch by removing a broken part and replacing it with a new one. It entails a sale of the part plus the labour for replacing it. (2) Asking a person to make a bed without providing the rope for its base. It entails a sale of the rope plus the labour for

attaching it to the base of the bed. (3) Buying water from a water-carrier. He went to a well, drew out the water and filled it into his water-skin. He is now the owner of the water. This entails a sale of the water plus his labour of carrying the water. (4) A person asks a jeweller to set a stone [e.g. diamond] to a ring. It entails a sale of the stone plus the labour for setting it. There are many other similar transactions.

Answer: This is a common practice which is done without any objections from anyone. It is a type of ijmāʽ (consensus). All these transactions are permissible. The text is therefore general in nature, but specific in certain situations. The jurists permitted this in the cases of dying a garment and tailoring a garment. The acts of dying and sewing are done by the dyer and tailor, and it also entails hiring him for his labour. This is quite obvious. Allāh taʽālā knows best.[1]

A detailed discussion on safqah fī safqah can be found in Kitāb al-Buyūʽ.

Allāh taʽālā knows best.

Hiring a wedding hall to non-Muslims

Question

Can a Muslim hire out his wedding hall to non-Muslims? We now with certainty that there will be music, dancing and other unlawful actions committed there.

Answer

Imām Abū Hanīfah rahimahullāh is of the view that it is permissible to hire out a hall to non-Muslims. Imām Muhammad and Imām Abū Yūsuf rahimahumallāh are of the view that it is makrūh. There is difference of opinion in the verdicts of our seniors. Hadrat Muftī Rashīd Ahmad Sāhib tries to reconcile this by saying that it is makrūh tanzīhī to hire it out to non-Muslims. Since your question is with regard to non-Muslims, we say it is not the ideal thing to do. At the same time, it will neither be harām nor makrūh tahrīmī.

Proofs in this regard were given previously.

Allāh taʽālā knows best.

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[1] *Imdād al-Fatāwā*, vol. 3, pp. 63-64.

Forfeiting a deposit when the ijārah is cancelled

Question

A person books a wedding hall for a Sunday and pays a deposit for it. He then cancels it a day or two before the event. Consequently, a certain amount is forfeited from his deposit. Is it permissible to do this?

Answer

Forfeiting an amount is similar to bayʿ ʿarbūn, and this is impermissible. However, if the owner of the wedding hall lays down a booking fee which is non-refundable – e.g. R100 – and this is for administrative purposes, telephone charges, office expenses, etc.; then this amount will not be refunded. This is similar to admission fees for a child; it is non-refundable.

A detailed explanation of bayʿ ʿarbūn was given previously in Kitāb al-Buyūʿ. Refer to it.

Proofs for the permissibility of admission fees can be found in *Imdād al-Ahkām*, vol. 3, p. 566 and *Imdād al-Fatāwā*, vol. 3, p. 402.

Allāh taʿālā knows best.

The precondition of paying for damages

Question

Due to certain reasons, an owner will lay down a condition to the hirer: "Whatever damages are suffered by the vehicle will have to be borne by you." Is this permissible? The books in general say that it is impermissible.

Answer

We gauge from the texts of some books, e.g. *Khulāsah, Bazzāzīyyah, Sharh al-Majallah*, that it is permissible for the one who hires out an item to lay down certain responsibilities on the hirer, even though the nature is a bit different. This is especially so when transactions involving ijārah are by and large based on societal norms and practices. Furthermore, the demands and requirements of the time cannot be disregarded completely. Based on this and in the view of common good, if a precondition is laid down on the hirer, the contract will not be invalid.

خلاصة الفتاویٰ:

و عمارة الدار و تطيينها وإصلاح ميزابها على الآجر أما تسييل ماء الحمام و تفريغه على المستاجر، قال فى المحيط: فإن شرط رب الحمام على المستاجر نقل الرماد والسرقين لا يفسد العقد. وفى النوازل: استاجر مكارياً ليحمل له الحنطة إلى مكان كذا فالجوالق والحبل على المكاري إن كان يحمله على دواب المستاجر أو على عنقه فذاك على المستاجر، قال الفقيه أبو الليث: المعتبر في ذلک عادات الناس في تلک البلدة ولو طلب من المكاري أن يدخل بيته فالمعتبر هو العرف. (خلاصة الفتاویٰ: ٣/١٤٨، الفصل التاسع فيما على الآجر وفيما على المستاجر)

فتاوی الشامی:

وفى البزازية: ولو امتلأ مسيل الحمام فعلى المستاجر تفريغه ظاهراً كان أو باطناً، وفيها وتسييل ماء الحمام وتفريغه على المستاجر وإن شرط نقل الرماد والسرقين رب الحمام على المستاجر لا يفسد العقد وإن شرط على رب الحمام فسد، فتأمل، ولعله مفرع على القياس أو مبنى على العرف ففى البزازية: وفي استئجار الطاحونة في كرى نهرها يعتبر العرف. (فتاوی الشامی: ٦/٨٠، سعيد)

شرح المجلة:

وفى الأنقروية عن البزازية: خرج المستاجر من البيت وفيه تراب ظاهر أو رماد، على المستاجر إخراجه، بخلاف البالوعة، فإنه يلزم المؤجر تفريغها استحساناً، وإن شرط على المستاجر عند العقد جاز، وأنه موافق للعقد، أى وإن كان العرف بخلافه، لأنه حدث بفعله، فالشرط الموافق للقياس وإن كان مخالفاً للعرف، لا يفسد العقد، تأمل. (شرح المجلة للاتاسی: ٢/٦٢٣، المادة: ٥٢٩)

شرح المجلة:

يلزم مراعاة الشرط بقدر الإمكان، أى إمكان الشرط واستطاعته، ولا يلزم ما فوق الاستطاعة... أن الشروط ثلاثة أقسام: قسم يجوز شرعاً، فيه فائدة لمن اشترطه، فهذا يلزم مراعاته... وقال فى البدائع من كتاب المضاربة: الأصل فى الشروط اعتبارها ما أمكن، وإذا كان القيد مفيداً كان ممكن الاعتبار فيعتبر لقوله عليه الصلاة والسلام: المسلمون عند شروطهم. (شرح المجلة: ١/٢٣٦، المادة: ٨٣)

The jurists state that if a co-partnered hireling damages an item, he will not pay a penalty. However, in today's times the verdict of obligation of a penalty has been issued for the protection of the wealth of people.

وبقولهما يفتى اليوم لتغير أحوال الناس وبه يحصل صيانة أموالهم كذا فى التبيين. (الفتاوى الهندية: ٤/٥٠٠)

فتاوى الشامى:

وقولهما قول عمر رضي الله عنه وعلى رضي الله عنه وبه يفتى احتشاماً لعمر رضي الله عنه وعلى رضي الله عنه وصيانةً لأموال المسلمين، والله أعلم. (فتاوى الشامى: ٦/٦٥، مطلب بالقياس يفتى على قوله، سعيد)

البحر الرائق:

وقد تقدم أن بقولهما يفتى في هذا الزمان لتغير أحوال الناس. (البحر الرائق: ٨/٢٧، باب ضمان الاجير، كوئته)

Allāh ta'ālā knows best.

Payment for taking the responsibility of getting the job done

Question

In an ijārah contract, the hireling is not responsible for any work. He is only responsible for its arrangement and administration. Is it permissible for him to take a payment for it?

Answer

It is permissible to take a payment and wage for the responsibility of the work. Nowadays, contractors do not do the actual work; they merely make the arrangements and take a payment for it. This is permissible.

وإن أطلق له العمل فله أن يستاجر من يعمله لأن المستحق عمل في ذمته ويمكن ايفاؤه بنفسه أو بالاستعانة بغيره بمنزلة إيفاء الدين. (الهداية: ٣/٢٩٧)

(وكذا فى البحر الرائق: ٧/٣٠٣، كوئته)

وفي رد المحتار: لأن المعقود عليه في حقه هو العمل أو أثره. (رد المحتار: ٦/٦٤، سعيد)

قوله أو أثره أى وأثره إذا لم يشترط أن يعمل بنفسه. (التحرير المختار: ٦/٢٦٨، سعيد)

Allāh taʿālā knows best.

When the amount of payment is unknown

Question

A person hired a hireling and said to him: "Your wage is R1 500.00. In addition to this, you will receive accommodation and meals." Is this permissible, bearing in mind that the amount and nature of food are unknown?

Answer

This practice is quite common, and each area and region provide boarding and lodging according to their financial position. There is quite a bit of tolerance and acceptance in this regard. Also, it does not

lead to disputes. A contract of this nature is therefore permissible and valid. Yes, it is essential to consider the rights of each person. If not, a person will be accountable for his actions on the day of Resurrection.

بدائع الصنائع:

و وجہ الاستحسان أن ہذا النوع من الجہالة لا يفضي إلى المنازعة، لأن مبنى الطعام على المسامحة فى العرف والعادة دون المضايقة، بخلاف ما إذا شرط كل واحد منہما على نفسہ كسوة العبد الذي يخدمہ أنہ لا يجوز، لأنہ يجري فى الكسوة المضايقة ما لا يجري فى الطعام فى العرف والعادة، فكانت الجہالة فى الكسوة مفضية إلى المنازعة مع ما أن الجہالة فى الكسوة تتفاحش بخلاف الطعام، لذلک افترقا. (بدائع الصنائع: انواع المہايئات وما يجوز منہا وما لا يجوز، ٧/٣١، كتاب القسمة، سعيد)

الفتاوى الغياثية:

استاجر حماراً ليحمل عليہ الحنطة ولم يعين مقدارہا ولا أشار إليہا قال الشيخ أبو بكرالمعروف بـ "خواہر زادہ": فسدت، وذكر شمس الأئمة الحلواني أنہ يجوز فينصرف إلى المعتاد وہذا أظہر وأشبہ وعليہ الفتوىٰ. (الفتاوى الغياثية، كتاب الاجارات، ص ١٥٨)

اعلاء السنن:

قلت: والحاصل أن الجہالة اليسيرة عفو في ما جرى بہ التعامل، لكونہا لا تفضي إلى النزاع عادة. (اعلاء السنن: ١٦/٢٠٩، باب اجرة السمسرة، ادارة القرآن)

تكملة فتح الملہم:

قال العبد الضعيف عفا الله عنہ: ويخرج على ہذا كثير من المسائل في عصرنا، فقد جرت العادة في بعض الفنادق الكبيرة أنہم يضعون أنواعاً من الأطعمة في

قدور كبيرة، و يخيرون المشترى في أكل ما شاء بقدر ما شاء، ويأخذون ثمناً واحداً معيناً من كل أحد فالقياس أن لا يجوز البيع لجهالة الأطعمة المبيعة وقدرها، ولكنه يجوز لأن الجهالة يسيرة غير مفضية إلى النزاع، وقد جرى بها العرف والتعامل، وكذلك استئجار السيارات، ربما لا يعرف سائقها مسافة السفر ولا تتعين الأجرة في بداية السفر، ولكن هذه الجهالة تتحمل، لكون العداد رافعاً للنزاع، ويتفق الراكب والسائق على أجرة يدل عليها العداد، فلا يقع النزاع. (تكملة فتح الملهم: ١/٣٢٠، باب بيع الحصاة والبيع الذى فيه غرر)

Kifāyatul Muftī:

Question: It is common practice to employ a person in one's house for a salary and the provision of meals. The employer does not describe the amount and nature of the food at the time of hiring the person. Is an employment of this nature permissible?

Answer: This employment is permissible. As regards the food, all the person needs to know is that he will receive enough to satisfy him.[1]

Further reading: *Imdād al-Muftīyyīn*, vol. 2, p. 716; *Mālī Muʿāmalāt Par Gharar Ke Atharāt*, p. 87.

Allāh taʿālā knows best.

When a specific hireling commits an offence

Question

A person gave a trust to one of his employees to convey to a certain place, e.g. from Roshnee to Johannesburg. On the way, the employee went to Lenasia for some of his own work. The moment he stopped his car, thieves broke open the door and stole the trust which was placed in a safe place. Some muftīs say the hireling does not have to pay any recompense because the item was kept in a safe place. Other muftīs say the hireling went to Lenasia for his own work, so he will have to pay recompense. What is the view of your Dār al-Iftā'?

[1] *Kifāyatul Muftī*, vol. 7, p. 310.

Answer

It was the employee's duty to take the R82 (name of the road) directly to Johannesburg. By choosing to go via Lenasia, he committed an offence and will be liable to pay a recompense. A person going from Roshnee to Johannesburg has no need whatsoever to go via Lenasia. The employee took that route by his own choice for his own work. In so doing, he acted against his employer's order. The imposition of a recompense is the core of justice.

المحيط البرہانی:

وسئل أبو بكر عمن أمر رجلاً أن يستكري له حماراً ويذهب إلى مكان كذا على أن يوفيه الآمر من الأجرة ففعل المامور ذلک وأدخله رباطاً فهجم عليه اللصوص في ذلک الرباط واستولوا على الحمار، قال: فإن كان الرباط على الطريق الذي كان ممر المستاجر عليه فلا ضمان... لأنه لم يخالف. (فعلم من ہذا ان لم يكن على الممر فيضمن) (المحيط البرہانی: ١٢/٣١)

شرح المجلة:

وكذا لا يضمن المال الذي تلف بعمله بلا تعد أيضاً... وفي رد المحتار: وقوله بعمله أی المأذون فيه، فإن أمره بعمل فيعمل غيره، ضمن ما تولد منه، (تاتارخانية) (شرح المجلة: ٢/٧١٨، المادة: ٦١٠)

الفتاوى الهندية:

وحكم أجير الوحد أنه أمين في قولهم جميعاً حتى أن ما ہلک من عمله لا ضمان عليه فيه إلا إذا خالف فيه والخلاف أن يأمره بعمل فيعمل غيره فيضمن ما تولد منه حينئذٍ ہكذا في شرح الطحاوي. (الفتاوى الهندية: ٤/٥٠٠، الباب الثامن والعشرون فی بيان حكم الاجير الخاص والمشترک)

Objection: The following text of *al-Hidāyah* suggests an objection to the above.

قال فى الهداية: وإن استاجر حمالاً ليحمل له طعاماً في طريق كذا فأخذ في طريق غيره يسلكه الناس فهلك المتاع فلا ضمان عليه وإن بلغ فله الأجر وهذا إذا لم يكن بين الطريقين تفاوت... أما إذا كان تفاوت يضمن، وإن كان طريقاً لا يسلكه الناس فهلك ضمن. (الهداية: ٣/٣٠٠)

Answer: This text applies to a destination having two paths, and people use both equally and both are safe. In such a case, there will be no recompense. In the case under question, the employee selected a completely wrong route. Moving on a road is one thing and leaving a road and going to another place is a separate issue. In the first case, there is no penalty while there is penalty in the second case.

Allāh taʿālā knows best.

Recompense from a co-partnered hireling

Question

A person opened a repair shop which repairs fridges and other similar appliances. A customer gave his microwave oven for repairs, and it disappeared. Is the shop-owner liable to pay a recompense?

Answer

A person who repairs machines in exchange for a payment is known as an ajīr mushtarak (co-partnered hireling) in the Sharīʿah. The fundamental ruling in this regard is that if an item is destroyed or stolen without the person having committed any excess in this regard, then there is no recompense. However, bearing in mind the present corrupt time and the negligence of hirelings, the latter day jurists – for the sake of protecting the wealth of people – issued the verdict of the obligation of paying a recompense. Therefore, recompense will be obligatory due to negligence and display of shortcomings.

لو تلف المستأجر فيه بتعدى الأجير وتقصيره يضمن سواء كان الأجير خاصاً أو مشتركاً، وسواء كانت الإجارة صحيحة أو فاسدة، لأن المستأجر فيه أمانة في يد الأجير، والأمانة تصير مضمونة بالتعدي أو التقصير بالحفظ، وهو ظاهر... تقصير الأجير هو عدم اعتنائه في محافظة المستأجر فيه بلا عذر. (شرح المجلة: ٢/٧١٠، ٧١٥، المادة: ٦٠٧)

ʿAllāmah Shāmī rahimahullāh writes:

والعرف فى الشرع له اعتبار – لذا عليه الحكم قد يدار

ما رأه المسلمون حسناً فهو عند الله حسن، واعلم أن اعتبار العادة والعرف رجح في مسائل كثيرة حتى جعلوا ذلک أصلاً فقالوا: تترک الحقيقة بدلالة الاستعمال والعادة... وفي شرح البيري عن المبسوط الثابت بالعرف كالثابت بالنص، ثم اعلم أن كثيراً من الأحكام التي نص عليها المجتهد صاحب المذهب بناء على ما كان في عرفه وزمانه قد تغيرت بتغير الأزمان بسبب فساد أهل الزمان أو عموم الضرورة... ومنه تضمين الأجير المشترک. (شرح عقود رسم المفتى، ص ٣٨)

تبيين الحقائق:

لأن تضمين الأجير المشترک كان نوع استحسان عندهما صيانة لأموال الناس لأنه يتقبل الأعمال من خلق كثير رغبة في كثرة الأجرة وقد يعجز عن القيام بها فيقعد عنده طويلاً فيجب عليه الضمان إذا هلكت بما يمكن التحرز عنه حتى لا يتوانى في حفظها - وفي حاشية الشيخ شهاب الدين الشلبي: قوله فيجب عليه الضمان حتى لا يقصر في حفظها أو لا يأخذ إلا بقدر ما يحفظه. (تبيين الحقائق مع الحاشية: ٥/١٣٨، باب ضمان الاجير، ملتان)

وقولهما قول عمر رضي الله عنه وعلى رضي الله عنه وبه يفتى احتشاماً لعمر رضي الله عنه وعلى رضي الله عنه وصيانةً لأموال المسلمين، والله أعلم. (فتاوى الشامى: ٦/٦٥، مطلب بالقياس يفتى على قوله، سعيد)

وقد تقدم أن بقولهما يفتى في هذا الزمان لتغير أحوال الناس. (البحر الرائق: ٨/٢٧، باب ضمان الاجير، كوئته. وكذا فى الفتاوى الهندية: ٤/٥٠٠)

Allāh taʿālā knows best.

When a teacher arrives ten minutes late to class

Question

A teacher arrives ten minutes late. How should this be made up? Should an amount be deducted from his salary? Is there any other option?

Answer

If a teacher makes it a habit to arrive late and does not desist from this habit even after several warnings, it will be permissible to deduct an amount from his salary. If he comes late occasionally and the madrasah overlooks it because of his sincerity or the teacher himself makes up for the lost time, then there is no harm in not deducting anything from his salary.

الدر المختار:

وليس للخاص أن يعمل لغيره، ولو عمل نقص من أجرته بقدر ما عمل فتاوى النوازل. وفى الشامية: قوله وليس للخاص أن يعمل لغيره، بل ولا يصلى النافلة، قال فى التتارخانية: وفي فتاوى الفضلي: وإذا استاجر رجلاً يوماً يعمل كذا فعليه أن يعمل ذلك العمل إلى تمام المدة ولا يشتغل بشيء آخر سوى المكتوبة وفي فتاوى سمرقند: وقد قال بعض مشايخنا له أن يؤدى السنة أيضاً، واتفقوا أنه لا يؤدي نفلاً، وعليه الفتوىٰ، وفي غريب الرواية قال أبو على الدقاق: لا يمنع فى المصر من إتيان الجمعة، ويسقط من الأجر بقدر اشتغاله إن كان بعيداً، وإن قريباً لم يحط شيء فإن كان بعيداً واشتغل قدر ربع النهار يحط عنه ربع الأجرة. قوله ولو عمل نقص من أجرته، قال فى التاترخانية: نجار استؤجر إلى الليل فعمل لآخر دواة بدرہم وہو يعلم فهو آثم، وإن لم يعلم فلا شيء عليه وينقص من أجر النجار بقدر ما عمل فى الدواة. (الدر المختار مع فتاوى الشامى: ٦/٧٠، مطلب ليس للاجير الخاص ان يصلى النافلة، سعيد. وكذا فى الفقه الحنفى فى ثوبه الجديد: ٤/٤١٥)

الفتاوى الولوالجية:

إذا استاجر يوماً للحصاد أو للخدمة فحصد في بعض اليوم أو خدم لغيره لا يستحق الأجر كاملاً، ويأثم. (الفتاوى الولوالجية: ٣/٣٣١، الفصل الاول فى ما تجوز الاجارة، دار الكتب العلمية، بيروت)

فإن وقعت على عمل معلوم فلا تجب الأجرة إلا بإتمام العمل إذا كان العمل مما لا يصلح أوله إلا بآخره، وإن كان يصلح أوله دون آخره فتجب الأجرة بمقدار ما عمل. (النتف فى الفتاوى، ص ٣٣٨، كتاب الاجارة، دار الكتب العلمية)

Fatāwā Mahmūdīyyah:

Once the times for a teacher are specified, he is an ajīr khās. It is not permissible for him to do any other work on ijārah during that time. If he does any small work which is normally overlooked and does not cause any real harm to the madrasah, or it is from among the necessities of life, then it will be permitted. For example, he writes a short letter or he has the need to relieve himself.[1]

Allāh ta'ālā knows best.

When payment is suspended to a condition

Question

A person said to a tailor: "If you sew my garment today, I will pay you R50. If you sew it tomorrow, I will pay you R40." Are these conditions valid? How do the views of Imām Abū Hanīfah rahimahullāh differ with those of Imām Muhammad and Imām Abū Yūsuf rahimahumallāh? Has anyone issued a verdict based on the view of the latter two Imāms?

Answer

Imām Abū Hanīfah rahimahullāh says that the first condition is valid while the second one is invalid. The payment will be similar to what is normally paid. Imām Muhammad and Imām Abū Yūsuf rahimahumallāh are of the view that both conditions are valid and

[1] *Fatāwā Mahmūdīyyah*, vol. 16, p. 573.

correct. Shaykh al-Islām Qādī al-Qudāt Abul Hasan ʿAlī as-Saghdī rahimahullāh (d. 461) prefers the view of Imām Muhammad and Imām Abū Yūsuf rahimahumallāh. Yes, if cheating is intended, it will not be permissible.

فإذا قال الخياط، إن خطت اليوم فلك درہم وإن خطت غداً فلك نصف درہم قال أبو حنيفة: الشرط الأول جائز والشرط الثاني باطل، وقال أبو يوسف ومحمد: الشرطان جائزان، وقال الشيخ: الشرطان جائزان إلا أن يقع على التغرير فيبطلان أو يقع أحدہما على التغرير فهو باطل، والتغرير أن يقول: إن خطت اليوم فلك درہم وإن خطت غداً فلك حبة أو فلس أو نحوہا. (النتف فى الفتاوى، ص ٣٣٩، الشرط فى الاجارة، دار الكتب العلمية بيروت)

وكذلک لو ساوم أحد الخياط على أن يخيط لہ جبة بشرط إن خاطها اليوم فلہ كذا وإن خاطها غدا فلہ كذا تعتبر الشروط... والحكم المذكور فيها، وہو صحة الإجارة مع اعتبار الشرطين، ہو قولهما، وعند أبي حنيفة يصح الشرط الأول، ولا يصح الشرط الثاني فلو خاطہ فى اليوم الأول يجب المسمى في ذلک اليوم اتفاقاً، وإن خاطہ فى اليوم الثاني، فعندہما وہو الذي مشت عليہ المجلة ، يجب المسمى فيہ. (شرح المجلة: ٢/٥٩٤، ٥٩٧، المادة: ٥٠٦)

Imdād al-Fatāwā:

Answer: I had just now asked for *al-Hidāyah* and read that it is permissible according to Imām Muhammad and Imām Abū Yūsuf rahimahumallāh. Although Imām Abū Hanīfah rahimahullāh is of the other view, it is permissible to act on it. This is especially if it will impact on the craftsman [the tailor in this case] and there is the possibility of him acting lazy if this condition is not laid down.[1]

Allāh taʿālā knows best.

[1] *Imdād al-Fatāwā*, vol. 3, p. 389.

An objection to ijārah of an Islamic bank

Question

This is how ijārah works in some Islamic banks: The bank sells a car to a person on ijārah and collects a monthly payment from him. Once the ijārah period ends, the bank gives the car to the person or sells it to him for a small payment. Is this system permissible in the Sharī'ah? Some scholars have the following objections to it:

1. The responsibility of repairs and maintenance of the vehicle ought to be on the owner, i.e. the bank, but the bank places this entire responsibility on the one who hired it.
2. The condition of hibah (gifting) is laid down. In other words, it entails safqah fī safqah. If the bank repossesses the vehicle, the person will certainly be unhappy. He has paid the value of the vehicle under the issue of hiring it. Then this would be an ijārah which is preconditioned by hibah.

Answer

1. It becomes absolutely clear from the statements of the jurists that if a condition is laid down on the musta'jir with regard to the usage of the hired item which benefits the musta'jir and considerable effect of it does not remain after the end of the ijārah, then this condition does not invalidate the contract. Since the bank hires it out for a long period (generally three years), and during this period the effect of the service, tuning, or minor repairs does not remain until after the three-year period; if the bank imposes a condition in this regard onto the musta'jir, then the contract will not be invalidated because of this condition. For example, filling petrol, servicing and tuning the vehicle, changing its plugs and battery and so on.

Observe the texts of the jurists:

وإن شرط أن يثنيها أو يكري أنهارها أو يسرقنها أو يزرعها بزراعة أرض أخرى لا، كإجارة السكنى بالسكنى، لأن أثر التثنية وكري الأنهار والسرقنة يبقى بعد انقضاء مدة الإجارة فيكون فيه نفع صاحب الأرض وهو شرط لا يقتضيه العقد فيفسد كالبيع، ولأن موجر الأرض يصير مستاجراً منافع الأجير على وجه يبقى بعد المدة فيصير صفقة في صفقة وهو مفسد أيضاً لكونه منهياً عنه حتى لو كان بحيث لا يبقى لفعله أثر بعد المدة بأن كانت المدة طويلة

أو كان الريع لا يحصل إلا به لا يفسد اشتراطه، لأنه مما يقتضيه العقد، لأن من الأراضي ما لا يخرج الريع إلا بالكراب مراراً وبالسرقنة، وقد يحتاج إلى كري الجداول ولا يبقى أثره إلى القابل بخلاف كري الأنهار، لأن أثره يبقى إلى القابل عادة، وفي لفظ الكتاب إشارة إليه حيث قال: كري الأنهار؛ لأن مطلقه يتناول الأنهار العظام دون الجداول واستئجار الأرض ليزرعها بأرض أخرى ليزرعها الآخر يكون بيع الشيء بجنسه نسيئة وهو حرام لما عرف في موضعه وكذا السكنى بالسكنى أو الركوب بالركوب إلى غير ذلك من المنافع. (تبيين الحقائق: ٥/١٣١، باب الاجارة الفاسدة، ملتان)

<u>الدر المختار مع رد المحتار:</u>

(أو أرضاً بشرط أن يثنيها أو كرى أنهارها) العظام وفى الشامية: قوله العظام، لأن أثره يبقى إلى القابل عادة، بخلاف الجداول أى الصغار فلا تفسد بشرط كريها هو الصحيح، ابن كمال، (أو يسرقنها) لبقاء أثر هذه الأفعال لرب الأرض، فلو لم تبق لم تفسد وفى الشامية: قوله فلو لم تبق، بأن كانت المدة طويلة لم تفسد لأنه لنفع المستاجر فقط. (وصحت لو استاجرها على أن يكريها ويزرعها أو يسقيها ويزرعها) لأنه شرط يقتضيه العقد. وفى الشامية: قوله لأنه شرط يقتضيه العقد ،لأن نفعه للمستاجر فقط. (الدر المختار مع رد المحتار: ٦/٥٩، ٦٠، باب الاجارة الفاسدة، سعيد)

Furthermore, this transaction is based on societal norms. The jurists laid down many rulings out of consideration to societal norms and practices. Nowadays, if a vehicle is hired for a few hours, then the hirer is responsible for its fuel and everything else. If it is for a few days, then the musta'jir is responsible for the fuel only. If it is for a few years, then the musta'jir is responsible for minor repairs, servicing and tuning, changing plugs and battery, etc.

A few proofs in this regard were quoted previously under the heading "Repairs to a rented house". Refer to them.

As regards fodder for animals, there is difference between a short and long period. In the early days, because the hajj journey was so long, the expenses for the fodder of the animal were borne by the musta'jir and not the mūjir.

فإن أراد الحمال أن يخرجه قبل ذلك فهو يريد أن يلزمه ضررالسفر من غيرحاجة إليه فيسقط عن نفسه مؤنة العلف فلا يمكن من ذلك- (المبسوط :١٦/٢٠، ط:دارالمعرفة)-

2. A detailed answer to the objection of safqah fī safqah was given in Kitāb al-Buyūʿ. Refer to it.

The ijārah arrangement which is chosen by an Islamic bank has two separate agreements. One is the ijārah, and the other is the sale or gifting at the end of the ijārah. Some institutions have only an ijārah agreement without any promise of a sale or gifting. However, in practice, when the ijārah period ends, the vehicle is sold to the musta'jir at a small price or given to him. Other institutions lay down a promise of a sale or gifting by the mūjir and the completion of the ijārah contract. When a promise is separate from the contract itself, it does not entail safqah fī safqah. In such a case, it becomes mandatory to fulfil the promise.

ولو ذكرا البيع بلا شرط ثم ذكرا الشرط على وجه العدة جاز البيع ولزم الوفاء بالوعد، إذ المواعيد قد تكون لازمة فيجعل لازماً لحاجة الناس. (جامع الفصولين: ١/٢٣٧، فصل فى بيع الوفاء)

فتاوىٰ قاضيخان:

وإن ذكر البيع من غيرشرط ثم ذكر الشرط على وجه المواعدة جاز البيع ويلزمه الوفاء بالوعد لأن المواعيد قد تكون لازمة فتجعل لازمة لحاجة الناس. (فتاوى قاضيخان على ہامش الهندية: ٢/١٦٥)

جامع الفصولين:

ولو تواضعا قبل البيع ثم تبايعا بلا ذكر شرط جاز البيع عند أبي حنيفة إلا إذا تصادقا أنهما تبايعا على ذلك المواضعة، وكذا لو تواضعا الوفاء قبل البيع ثم

قعدا بلا شرط الوفاء فالعقد جائز، ولا عبرة للمواضعة السابقة. (جامع الفصولين: ١/٢٣٧، فصل فى بيع الوفاء)

وللاستزادة انظر: (احكام القرآن للجصاص: ٢/٢٩٥، والمبسوط للامام السرخسى: باب زكوٰة الابل، ص ١٧٩، ورد المحتار: ٥/٨٤، مطلب فى الشرط الفاسد اذا ذكر بعدالعقد او قبل، سعيد. ودرر الحكام فى شرح مجلة الاحكام: ١/٧٧، المادة: ٨٤، دار الكتب العلمية. وامداد الفتاوىٰ: ٣/١٠٨. غير سودى بينكارى، ص ٢٥٦)

Allāh taʿālā knows best.

When a tenant sub-leases a property

<u>Question</u>

A person rented a house for R2 000.00. He now wants to rent it to another person for R2 500.00. Is it permissible to do this?

<u>Answer</u>

It is permissible to sub-lease a rented item, but not permissible to ask for more than the rent he is paying. If he receives an additional amount, it will be obligatory to give it in charity.

The jurists permit an additional amount to the original rental in two situations:

1. The tenant gives the same house to another person on a rental amount which is of a different genus [currency] from the original genus. Because it is of a different genus, it will be permissible to charge extra.
2. The tenant does some repairs and renovations to the house, and thereby increases its value. Or, he adds something of his own to it, and charges an extra amount for the whole.

(وله السكنى بنفسه إسكان غيره بإجارة وغيرها) وكذا كل ما لا يختلف بالمستعمل يبطل التقييد لأنه غير مفيد، بخلاف ما يختلف، ولو آجر بأكثر تصدق بالفضل إلا في مسألتين: إذا آجرها بخلاف الجنس أو أصلح فيها شيئاً.

وفى الشامية: قولہ بخلاف الجنس، أى جنس ما استاجر بہ وكذا إذا آجر مع ما استاجر شيئاً من مالہ يجوز أن تعقد عليہ الإجارة فإنہ تطيب لہ الزيادة كما فى الخلاصة، قولہ أو أصلح فيها شيئاً، بأن جصصها أو فعل فيها مسناة وكذا كل عمل قائم لأن الزيادة بمقابلة ما زاد من عنده حملاً لأمره على الصلاح كما فى المبسوط. (الدر المختار مع رد المحتار: ٦/٢٩، باب ما يجوز من الاجارة، سعيد)

وإذا استاجر داراً وقبضها ثم آجرہا فإنہ يجوز إن آجرہا بمثل ما استاجرہا أو أقل وإن آجرہا بأكثر مما استاجرہا فهي جائزة أيضاً إلا أنہ إن كانت الأجرة الثانية من جنس الأجرة الأولىٰ فإن الزيادة لا تطيب لہ ويتصدق بها وإن كانت من خلاف جنسها طابت لہ الزيادة ولو زاد فى الدار زيادة كما لو وتد فيها وتداً أو حفر فيها بئراً أو طيناً أو أصلح أبوابها أو شيئاً من حوائطها طابت لہ الزيادة. (الفتاوى الهندية: ٤/٤٢٥، الباب السابع فى اجارة المستاجر)

Fatāwā Mahmūdīyyah:

You may sub-rent a place to someone else for the same amount of rent which you are paying. If you collect more than that, you will have to give the extra amount in charity.

If the person did not make any changes to the property, the additional profits are impermissible. It is obligatory to give the extra amount in charity. If he renovated or repaired the property, and then gives it on rent to someone else, the additional profits are permissible.[1]

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

The essential rule of the Sharīʿah is that this transaction is permissible provided it is not with one's mūjir and it is less than the first rental amount. If it is more, the additional amount will be impermissible. It will be obligatory to give it in charity.

Yes, if the second transaction is of a different genus from the first one, or the tenant does some repairs and renovations to it – for example, if

[1] *Fatāwā Mahmūdīyyah*, vol. 16, pp. 605-606.

it is a house, he renovates it, has it painted, etc. and if it is a piece of land, then he repairs its drainage, etc. – it will be permissible to charge more than the original rent.[1]

Further reading: *Kifāyatul Muftī*, vol. 7, p. 331.

Allāh taʿālā knows best.

Repairs to a television

Question

A person repairs televisions and other similar appliances, and he charges for the repairs. Is it permissible to take a payment for the repairs? Is his income lawful?

Answer

A television in itself is not an item of play and amusement. It can be used for educational, reformational and scientific purposes. The work of repairing a television should therefore be lawful and its income should also be lawful. However, in our times, it is mostly used for play and amusement, immorality, nudity and shamelessness. Repairing it therefore entails an element of "aiding in sin". Based on this, it is disliked to do this work and its income will be makrūh. It is better to abstain from it.

وبيع المكعب المفضض للرجل إن ليلبسه يكره، لأنه إعانة على لبس الحرام وإن كان إسكافاً أمره إنسان أن يتخذ له خفاً على زي المجوس أو الفسقة أو خياطاً أمره أن يتخذ له ثوباً على زي الفساق يكره له أن يفعل. (فتاوى الشامى: ٦/٣٩٢، كتاب الحظر والاباحة، سعيد)

ثم السبب إن لم يكن محركاً وداعياً، بل موصولاً محضاً، وهو مع ذلك سبب قريب بحيث لا يحتاج في إقامة المعصية به إلى إحداث صنعة من الفاعل كبيع السلاح من أهل الفتنة، وبيع العصير ممن يتخذه خمراً... وإجارة البيت ممن يبيع فيه الخمر أو يتخذها كنيسة أو بيت نار وأمثالها، فكله مكروه تحريماً إن يعلم به البائع والآجر، من دون تصريح به باللسان، فإنه إن لم يعلم كان

[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 216.

معذوراً ...لكن الإعانة حقيقة هي ما قامت المعصية بعين فعل المعين ولا يتحقق إلا بنية الإعانة أو التصريح بها أو تعينها في استعمال هذا الشيء، بحيث لا يحتمل غير المعصية. (جواهر الفقه: ٢/٤٥٣، مسئلة الاعانة على الحرام)

وفى الدر المختار: قلت: إن ما قامت المعصية بعينه يكره بيعه تحريماً وإلا فتنزيهاً فليحفظ توفيقاً. (الدر المختار: ٦/٣٩١، كتاب الحظر والاباحة، سعيد)

(كذا فى فتاوى قاضيخان على هامش الهندية: ٢/٣٦٤. والفتاوى البزازية على هامش الهندية: ٥/١٢٥)

Kitāb al-Fatāwā:

A television, radio, tape recorder, etc. are also used for lawful purposes. The income derived from their sale and repairs is therefore permissible. However, since a television is mostly used for impermissible actions, profits from its sale and income from its repair are not without detestability.

A detailed verdict on the sale of televisions can be found in Kitāb al-Buyūʿ. Refer to it.

Allāh taʿālā knows best.

A commission agent

Question

There are certain dealings which people engage in. I want the ruling on them:

1. Hens are given to a person. He is to take care of them and the eggs which they lay will be shared between the two [the person who gave the hens and the person who took care of them].
2. Chicks are given to a person. After he takes care of them and they grow, they are shared between the two.
3. A person is sent to collect donations and he is told that he will receive 25% of the amounts received.
4. A person is given items to sell and he is told that he will receive 10% of the sale price.

5. A person is asked to harvest a crop and he is told the he will receive one bag for every ten bags of the harvest.

Some ʿulamāʾ say that these agreements are impermissible because they fall under the ruling of qafīz at-tahhān (i.e. giving a certain portion of the flour to the person who pounds the grain into flour). Kindly explain in detail.

Answer

The general principle of "societal norms and habits, and practices of people" holds a paramount position in the Sharīʿah. Many juridical rulings are based on this principle. The above transactions and agreements are also of this nature. Nowadays, commission agents and taking a share in certain transactions have become the norm. This is why all the above transactions are permissible.

The issue of qafīz at-tahhān is established from the Hadīth. Giving a commission for donations received or sharing the eggs and chickens for the task of taking care of the hens, etc. are proven through analogical reasoning (qiyās). It is also an accepted principle that if there is a conflict between qiyās and societal norms (ʿurf), then the latter will be practised upon and qiyās will be left out. This is because common practice and societal norms are attached to ijmāʿ (consensus).

Hadrat Thānwī rahimahullāh writes:

قال في نور الأنوار: وتعامل الناس ملحق بالإجماع وفيه ثم إجماع من بعدهم أى بعد الصحابة رضي الله عنهم من أهل كل عصر.

We learn from this that like ijmāʿ, taʿāmul (common practice of people) is not confined to any specific era. However, it is necessary to apply the same principles in taʿāmul as applied in ijmāʿ. In other words, the ʿulamāʾ of the present era do not express their disapproval of it. Similarly, the jurists have furnished taʿāmul as a basis for permitting many new issues.

كما فى الهداية: فى البيع الفاسد: ومن اشترى نعلاً على أن يحذوه البائع قوله يجوز للتعامل فيه فصار كصبغ الثوب للتعامل جوزنا الاستصناع وفيها فى السلم أن استصنع الى قوله للإجماع الثابت بالتعامل.[1]

قال فى الكفاية: وجه الاستحسان أن فيه عرفاً ظاهراً وفى النزوع عن العادة حرج بين فصار كصبغ الثوب لأن القياس أن لا يجوز لأن الإجارة بيع المنافع والصبغ عين وجوزناها للتعامل وكالاستصناع فإن بيع المعدوم لا يجوز وإنما جوزناه للتعامل. (الكفاية شرح الهداية على هامش فتح القدير: ٨٥/٦، رشيدية)

وقال فى العناية: ووجهه ما بيناه أنه شرط لا يقتضيه العقد وفيه منفعة لأحد المتعاقدين وفى الاستحسان يجوز للتعامل والتعامل قاضٍ على القياس لكونه إجماعاً فعلياً كصبغ الثوب. (العناية فى شرح الهداية على هامش فتح القدير: ٨٥/٦، رشيدى)

قال العلامة الزيلعي في تبيين الحقائق: وكان مشايخ بلخ والنسفي يجيزون حمل الطعام ببعض المحمول ونسج الثوب ببعض المنسوج لتعامل أهل بلادهم بذلك وقالوا من لم يجوزه إنما لم يجوزه بالقياس على قفيز الطحان والقياس يترك بالتعارف، ولئن قلنا إن النص يتناوله دلالة فالنص يختص بالتعامل ألا ترى أن الاستصناع ترك القياس فيه وخص عن القواعد الشرعية بالتعامل.

وبهامشه قال الشيخ شهاب الدين الشلبي: وأما مشايخ بلخ فإنما جوزوا ذلك لأن الناس تعاملوا بذلك حيث احتاجوا إليه ووجدوا له نظيراً وهو المزارعة

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[1] *Fiqh Ḫanafī Ke Usūl Wa Ḍawābiṭ*, p. 161 as quoted from *Imdād al-Fatāwā*, vol. 4, p. 265.

والمعاملة، اتقاني. (تبيين الحقائق مع الحاشية: ٥/١٣٠، باب الاجارة الفاسدة، ملتان)

وہكذا فى البحر الرائق وزاد بقولہ: وفى الظهيرية: وبہ أخذ الفقيہ أبو الليث وشمس الأئمة الحلواني والقاضي أبو على النسفي. (البحر الرائق: ٨/٢٤، باب الاجارة الفاسدة، كوئٹہ)

وإذا دفع الرجل إلى حائك غزلاً لينسجہ بالنصف أو ما أشبہ ذلک فالإجارة فاسدة واما لأنہ في معنى قفيز الطحان لأنہ جعل الأجر بعض ما يحدث من عملہ... ومشايخ بلخ كنصير بن يحيىٰ ومحمد بن سلمة وغيرہما كانوا يفتون بجواز ہذه الإجارة فى الثياب لتعامل أہل بلدہم فى الثياب والتعامل حجة يترک بہ القياس ويخص بہ الأثر وتجويز ہذه الإجارة فى الثياب للتعامل بمعنى تخصيص النص الذي ورد في قفيز الطحان، لأن النص ورد في قفيز الطحان، لا فى الحائک إلا أن الحائک نظيره فيكون وارداً فيہ دلالة، فمتى تركنا العمل بدلالة ہذا النص فى الحائک وعملنا بالنص في قفيز الطحان كان تخصيصاً، لا تركاً أصلاً وتخصيص النص بالتعامل جائز. (المحيط البرہانى: ٩/١٧٩، نوع آخر فى قفيز الطحان، مكتبة رشيدية)

(وہكذا فى الشامى: ٤/٥١٩، مطلب فى الاعتياض عن الوظائف، سعيد. والفتاوى الہندية: ٤/٤٤٥، الفصل الثالث فى قفيز الطحان وما ہو معناه. وكذا فى تكملة فتح القدير: ٩/١٠٩، باب الاجارة الفاسدة، دار الفكر)

تتمة: قال فى التاترخانية: وفى الدلال والسمسار يجب أجر المثل، وما تواضعوا عليہ أن في كل عشرة دنانير كذا فذک حرام عليهم - وفى الحاوي: سئل محمد بن سلمة عن أجرة السمسار فقال: أرجو أنہ لا بأس بہ وإن كان فى الأصل فاسداً لكثرة التعامل وكثير من ہذا غير جائز، فجوزوه لحاجة الناس إليہ

كدخول الحمام، وعنه قال: رأيت ابن شجاع يقاطع نساجاً ينسج له ثياباً في كل سنة. (فتاوى الشامى: ٦/٦٣، مطلب فى اجرة الدلال، سعيد)

قال الفقيه أبوالليث: النسج بالثلث والربع لا يجوز عند علمائنا لكن مشايخ بلخ استحسنوا وأجازوا لتعامل الناس، قال: وبه نأخذ. (الفتاوى الغياثية، كتاب الاجارات، نوع فى النساج، ص ١٦٠)

وفى "الفقه الحنفي في ثوبه الجديد": قال: ولرأي مشايخ بلخ والنسفي وجاهة في عصرنا الحاضر، لأن التعامل به شاع وانتشر في كل البلاد. (الفقه الحنفى فى ثوبه الجديد: ٤/٤٠٣، الاستئجار ببعض ما يخرج من عمل الاجير)

Imdād al-Fatāwā:

Question: (333)... (4) A buyer writes a note to a commission agent for fabric. The agent buys the fabric as per the request, and takes an agreed-upon percentage as commission. Is this permissible? (5)In some places, one paisa per rupee is assigned for the commission agent. In other words, for whatever price he sells the fabric, he will receive one paisa for every rupee. Is this permissible?

Answer:

في شرح طريقة المحمدية للخادمى الجزء الرابع منه عن لب الاحياء وأما إعانته على عمل معين إلى قوله أو مباحاً فيه تعب بحيث يجوز الاستئجار عليه حل أخذه وهو جعل - وفى جامع الفصولين: للقاضى أن يأخذ.

We learn from this narration that since there is some work and exertion involved in brokering the transaction, it is permissible to take a wage for it. (5) Since the permissibility of a wage is established, one of its conditions is establishing the wage. And this [taking a commission] is one of the ways of establishing the wage. This is why it seems to be permissible.[1]

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[1] *Imdād al-Fatāwā*, vol. 3, p. 363.

Imdād al-Ahkām:

Question: There are two persons, Zayd and Bakr. Zayd said to Bakr: "I have some goods. If you are able to sell them, I will give you such and such amount of rupees as a commission." Is it permissible to accept a commission of this nature?

Answer: *al-Fatāwā al-Hindīyyah* quotes from *Dhakhīrah* stating that this is harām. Shāmī rahimahullāh also quotes the ruling of impermissibility from *Tātārkhānīyyah*. However, he quotes its permissibility from Muhammad ibn Salamah...Hadrat Maulānā Thānwī rahimahullāh gives preference to the ruling of permissibility.

والجواب عن الفساد للجهالة، أن هذه الجهالة لا يفضي إلى النزاع. فكانت يسيرة، وهي لا يفسد الإجارة والبيع.

Nowadays there is immense need for it. It is best to state its permissibility. Allāh ta'ālā knows best.[1]

I'lā' as-Sunan:

قلت: والحاصل أن الجهالة اليسيرة عفو في ما جرى به التعامل، لكونها لا تفضي إلى النزاع عادة. (إعلاء السنن، ج ١٦، ص ٢٠٩).

Qāmūs al-Fiqh:

Nowadays, the practice of commission is in vogue in various businesses. In other words, instead of giving a specified wage to its salesman, a company lays down a certain percentage. For example, from all his sales, the salesman will receive 10% as his wage...Many religious and other institutions which operate through the support of people pay their staff a certain percentage as a wage; and not a fixed monthly salary. The advantage of this system to a madrasah [for example] is that if a fixed salary is set, the employee might be lax in carrying out his duties...These contemporary issues require the 'ulamā' to think deeply and focus their attention on them...From the Hanafī scholars, the 'ulamā' of Balkh say that it is permissible out of consideration to societal norms.[2]

'Allāmah Anwar Shāh Kashmīrī rahimahullāh says that buying/selling transactions of this nature are permissible on the basis of religious

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[1] *Imdād al-Ahkām*, vol. 3, p. 589.

[2] *Qāmūs al-Fiqh*, vol. 1, p. 499.

integrity. This applies where the value of the item is not fully established, but there is no possibility of dispute in the future. He writes:

إن من البيوع الفاسدة ما لو أتى بها أحد جازت ديانة وإن كانت فاسدة قضاءً وذلك لأن الفساد قد يكون لحق الشرع بأن اشتمل العقد على مآثم فلا يجوز بحال وقد يكون الفساد لمخالفة التنازع ولا يكون فيه شيء آخر يوجب الإثم فذلك إن لم يقع فيه التنازع جاز عندي ديانة وإن بقي فاسداً قضاءً لارتفاع علة الفساد وهي المنازعة. (فيض الباری: ٣/٢٥٨)[1]

Further reading: *Jadīd Fiqhī Masā'il*, vol. 4, pp. 329-334; *Buhūth Fī Qadāyā Fiqhīyyah Mu'āsirah*, vol. 1, pp. 206-208; *Qāmūs al-Fiqh*, vol. 1, p. 498; *Mālī Mu'āmalāt Par Gharar Ke Atharāt*, pp. 89-90.

A reply to the Hadīth which makes reference to qafīz at-tahhān

1. This Hadīth is weak.

قال المناوي في فيض القدير: قال فى الميزان: هذا حديث منكر وهشام أبو كليب أحد رواته لا يعرف، وأورده عبد الحق فى الأحكام... وفيه هشام أبو كليب قال ابن القطان: لا يعرف، والذهبي: حديثه منكر ومغلطائي: هو ثقة وجزم ابن حجر بضعف سنده. (فيض القدير: ٦/٣٣٥/٩٤٩٣. وكذا فى التلخيص الحبير: ٣/١٤٦/١٢٨٧. وميزان الاعتدال: ٥/٤٣١)

وقال الحافظ ابن حجر فى الدراية: حديث نهى النبي صلى الله عليه وسلم عن قفيز الطحان، الدارقطني وأبو يعلى والبيهقي وفي إسناده ضعف. (الدراية فى تخريج احاديث الهداية: ٣/٣٠٥، باب الاجارة الفاسدة)

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[1] Quoted from *Jadīd Fiqhī Masā'il*, vol. 4, p. 323.

وفي خلاصة البدر المنير: حديث النهى عن قفيزالطحان رواه الدارقطنى من رواية أبي سعيد رضي الله عنه بإسناد فيه مجهول. (خلاصة البدر المنير: ٢/١٠٧/١٦٥٥)

قال البوصيري في اتحاف الخيرة المهرة: مدار هذه الطرق على عبد الرحمن الأفريقي وهو ضعيف. (اتحاف الخيرة المهرة: ٤/٢٦٢/٣٨٢٠، باب النهى عن عسب الفحل وقفيزالطحان)

2. The text is general in nature, while part of it is specific. In other words, the text has been made specific on account of societal norms and common practice. This has been stated by ʿAllāmah Nasafī raḫimahullāh and ʿAllāmah Shāmī raḫimahullāh.

ثم اعلم أن العرف قسمان عام وخاص فالعام يثبت به الحكم العام ويصلح مخصصاً للقياس والأثر بخلاف الخاص...قال فى الذخيرة فى الفصل الثامن من الإجارات في مسألة ما لو دفع إلى حائك غزلاً لينسجه بالثلث ومشايخ بلخ كنصير بن يحيي ومحمد بن سلمة وغيرهما كانوا يجيزون هذه الإجارة فى الثياب لتعامل أهل بلدهم فى الثياب والتعامل حجة يترك به القياس ويخص به الأثر وتجويز هذه الإجارة فى الثياب للتعامل بمعنى تخصيص النص الذي ورد في قفيز الطحان لأن النص ورد في قفيز الطحان لا فى الحائك إلا أن الحائك نظيره فيكون وارداً فيه دلالة فمتى تركنا العمل بدلالة هذا النص فى الحائك وعملنا بالنص في قفيز الطحان كان تخصيصاً لا تركاً أصلاً وتخصيص النص بالتعامل جائز ألا ترى أنا جوزنا الاستصناع للتعامل والاستصناع بيع ما ليس عنده وإنه منهي عنه وتجويز الاستصناع بالتعامل تخصيص منا للنص الذي ورد فى النهي عن بيع ما ليس عند الإنسان لا ترك للنص أصلاً لأنا عملنا بالنص في غير الاستصناع قالوا: بخلاف ما لو تعامل أهل بلدة قفيز الطحان فإنه لا يجوز ولا تكون معاملتهم معتبرة لأنا لو اعتبارنا معاملتهم

كان تركاً للنص أصلاً وبالتعامل لا يجوز ترك النص أصلاً وإنما يجوز تخصيصه ولكن مشايخنا لم يجوزوا ہذا التخصيص لأن ذلك تعامل أہل بلدة واحدة... بخلاف التعامل فى الاستصناع فإنه وجد فى البلاد كلها، انتہى كلام الذخيرة. (شرح عقود رسم المفتى، ص ٤١. وكذا فى رسالة "نشر العرف فى بناء بعض الاحكام على العرف" المندرجة فى رسائل ابن عابدين، ٢/١١٤، سہيل)

ʻAllāmah Nasafī ra<u>h</u>imahullāh states:

والاستحسان أنواع يكون بالأثر والإجماع والضرورة والقياس الخفي كالسلم فإن القياس يأبى جوازه لعدم المعقود عليه عند العقد إلا أنا تركناه بالنص وہو قوله عليه السلام "من أسلم منكم فليسلم في كيل معلوم" الحديث، والاستصناع فيما فيه تعامل الناس مثل أن يأمر إنساناً بأن يخرز له خفاً بكذا ويبين صفته ومقداره ولم يذكر له أجلاً والقياس يقتضي أن لا يجوز لأنه بيع معدوم لكنہم استحسنوا تركه بالإجماع لتعامل الناس فيه فإن قلت: الإجماع وقع معارضاً بالنص وہو قوله عليه السلام "لا تبع ما ليس عندك." وأجيب بأن النص صار مخصوصاً في حق ہذا الحكم بالإجماع، وفيه نظر لأن القران شرط الخصوص عندنا والإجماع ليس بمقارن ويمكن أن يجاب عنه بأن القران شرط التخصيص الأول والنص مخصوص قبل الإجماع بالسلم فيجوز بعده بالإجماع. (منار مع شرحه لعبد اللطيف ابن الملك، ٢/٨١٢)

Allāh taʻālā knows best.

An estate agent collecting service fees

Question

Is it permissible for an estate agent to collect service fees on a percentage basis?

Answer

The service fees charged by an estate agent fall under the category of a commission, and it is permissible for a commission agent to charge on a percentage basis.

تتمة: قال فى التاتارخانية: وفى الدلال والسمسار يجب أجر المثل وما تواضعوا عليہ أن في كل عشرة دنانير كذا فذلک حرام عليهم، وفى الحاوي: سئل محمد بن سلمة عن أجرة السمسار، فقال: أرجو أنہ لا بأس بہ وإن كان فى الأصل فاسداً لكثره التعامل، وكثير من ہذا غير جائز فجوزوه لحاجة الناس إليہ كدخول الحمام. (فتاوى الشامى: ٦/٦٣، سعيد)

Mālī Muʿāmalāt Par Gharar Ke Atharāt:

When it comes to transacting with an estate agent, the two parties do not know the amount of running around the estate agent has to endure for the sale of a property. Furthermore, the payment is unknown. However, since the ignorance in this case does not lead to dispute, and also because transactions of this nature are quite common nowadays and there is a need for them, the jurists classified it as permissible.[1]

Details on this issue were given in the previous question and answer. There is no need to repeat them.

Allāh taʿālā knows best.

A representative who sells on a commission basis

Question

Zayd appointed ʿUmar as his representative for the sale of a building. He said to him that he must sell it at a minimum price of R12 000.00 a square metre, with a commission of four percent. If he sells it at a higher price, e.g. R18 000.00 per square metre, then the additional R6 000.00 will be shared equally between the two. Is this agreement permissible?

Answer

An agreement where the commission is on a percentage basis is permissible on the basis of common practice and societal norms.

[1] *Mālī Muʿāmalāt Par Gharar Ke Atharāt*, p. 90.

Imdād al-Fatāwā:

Since there is some work and exertion involved in brokering the transaction, it is permissible to take a wage for it. Since the permissibility of a wage is established, one of its conditions is establishing the wage. And this [taking a commission] is one of the ways of establishing the wage. This is why it seems to be permissible.[1]

Imdād al-Ahkām:

Question: There are two persons, Zayd and Bakr. Zayd said to Bakr: "I have some goods. If you are able to sell them, I will give you such and such amount of rupees as a commission." Is it permissible to accept a commission of this nature?

Answer: *al-Fatāwā al-Hindīyyah* quotes from *Dhakhīrah* stating that this is harām. Shāmī rahimahullāh also quotes the ruling of impermissibility from *Tātārkhānīyyah*. However, he quotes its permissibility from Muhammad ibn Salamah…Hadrat Maulānā Thānwī rahimahullāh gives preference to the ruling of permissibility.

والجواب عن الفساد للجهالة، أن هذه الجهالة لا يفضي إلى النزاع. فكانت يسيرة، وهي لا يفسد الإجارة والبيع.

Nowadays there is immense need for it. It is best to state its permissibility. Allāh taʿālā knows best.[2]

Detailed proofs were provided previously. Refer to them.

Allāh taʿālā knows best.

Collecting a commission from both parties

Question

Is it permissible for a person to collect a commission from the buyer and the seller?

Answer

It is permissible for an agent to collect a commission from the buyer and the seller.

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[1] *Imdād al-Fatāwā*, vol. 3, p. 363.

[2] *Imdād al-Ahkām*, vol. 3, p. 589.

وأما الدلالة فإن باع العين بنفسه بإذن ربها فأجرته على البائع وإن سعى بينهما وباع المالک بنفسه يعتبر العرف. وفى الشامية: قوله يعتبر العرف، فتيجب الدلالة على البائع أو المشتري أو عليهما بحسب العرف، جامع الفصولين. (الدر المختار مع رد المحتار: ٤/٥٦٠، فصل فيما يدخل فى البيع تبعاً، سعيد)

شرح منظومة:

فائدة: نقل فى العمادية عن فوائد صاحب المحيط لو سعى الدلال بينهما و باع المالک بنفسه ينظر إلى العرف إن كانت الدلالة على البائع فعليه، وإن كانت على المشتري فعليه، وإن كانت عليهما فعليهما. (شرح منظومة ابن وہبان: ٢/٧٨، فصل من كتاب الاجارة، الوقف المدنى)

مجمع الضمانات:

و لو سعى الدلال بينهما، وباع المالک بنفسه، يعتبر العرف، فتجب الدلالة على البائع، أو على المشتري أو عليهما، بحسب العرف. (مجمع الضمانات: ١/١٥٩، النوع السابع عشر: الدلال ومن بمعناه)

Fatāwā Mahmūdīyyah:

Brokerage on both sides is permissible if this is a norm. The transaction of a commission agent is essentially impermissible. However, the jurists permitted it on the basis of need and societal norms. The general nature of this permission includes a one-sided and a two-sided commission.[1]

Nizām al-Fatāwā:

If a person works for both parties, he may collect the normal fee for each distinguishable work because they are different types of work.[2]

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[1] *Fatāwā Mahmūdīyyah*, vol. 16, p. 617.

[2] *Nizām al-Fatāwā*, vol. 1, p. 297.

Ta'līfāt Rashīdīyyah:

Question: A person said to another: "If I get your job done, I will collect such and such amount as a commission." Is this permissible? Is it necessary for the seller to inform the buyer of this, or is it okay to make the agreement with just one party? What if the person makes a commission agreement - whether explicitly or secretly - with both parties?

Answer: Collecting a commission payment is permissible provided there is no deception and cheating.[1]

Mahmūd al-Fatāwā:

If it is common practice to collect a commission from both parties, it is permissible. If not, it is impermissible.[2]

Ahsan al-Fatāwā:

Question: Is it permissible to collect a commission from both parties?

Answer: It is permissible.[3]

Allāh ta'ālā knows best.

The pre-condition of opening a business on a Friday

Question

What do the scholars say about the following:

A person wants to open a restaurant in a shopping centre. The shopping centre management is extremely strict on the times of business. A non-Muslim manager will run the restaurant and the staff will also be non-Muslims. Based on the hours of business, it will not be permitted to close the restaurant at the time of jumu'ah. What is the ruling of the Sharī'ah in this regard?

Answer

As long as the conditions and prerequisites are not in conflict with the Sharī'ah, it is obligatory on the person to abide by them. Adhering to the hours of business is not against the Sharī'ah, so one will have to abide by the times. It is also permissible to employ a non-Muslim manager. The Sharī'ah considers transactions concluded by a

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[1] *Ta'līfāt Rashīdīyyah*, p.418.

[2] *Mahmūd al-Fatāwā*, vol. 3, p. 85.

[3] *Ahsan al-Fatāwā*, vol. 7, p. 272.

representative to be valid in a business. It is not necessary for the representative to be a Muslim. A non-Muslim can also be a representative for a sale.

As regards opening a business during the hours of the jumuʿah salāh, Hadrat Muftī Muhammad Shafīʿ Sāhib rahimahullāh has written in *Maʿārif al-Qur'ān* that both buying and selling are prohibited. If a person opens his business, customers will certainly enter it. However, this applies when the majority of the buyers are Muslims. If the majority are non-Muslims, as in this country, then it will not be impermissible for a non-Muslim to open the business. After all, hastening to the jumuʿah salāh is obligatory on Muslims; not on non-Muslims. Furthermore, the jurists have stated that buying and selling is not prohibited on those on whom jumuʿah is not obligatory, e.g. the sick, travellers, women, etc. Thus, it is not prohibited for a non-Muslim to keep the shop open during the time of jumuʿah salāh. The income which you receive is not harām.

As regards laying down a condition in the rental contract, the jurists say that if a condition is not suited to the agreement or not in conflict with the requirements of the agreement, then the agreement will not be invalidated on account of it. Thus, a rental contract of this nature will not be invalid because opening the shop at jumuʿah time is not in conflict with the rental contract. Yes, it is essential for no Muslim to remain in the business during the time of jumuʿah salāh. All the staff will have to be non-Muslims.

ومن استاجر أرضاً على أن يكربها ويزرعها ويسقيها لأن الزراعة مستحقة بالعقد ولا يتاتى إلا بالسقي والكراب... وكل شرط هذه صفته يكون من مقتضيات العقد فذكره لا يوجب الفساد. (الهداية: ٣/٣٠٦)

شرح المجلة:

وكذا تفسد الإجارة لو استاجر بشرط لا يقتضيه العقد و لا يلائمه... بخلاف ما لو آجرها بشرط أن يحرثها ويزرعها أو يسقيها و يزرعها، فإنها لا تفسد، لأنه شرط يقتضيه العقد... ولو شرط أن يكري أنهارها العظام أو يسرقنها بحيث يبقى أثر هذه الأفعال لرب الأرض، تفسد لما ذكرنا، فلو لم تبق، بأن شرط كري

جداولها الصغار، أو كانت المدة طويلة، لا تفسد، لأنه لنفع المستاجر، فهو شرط يقتضيه العقد. (شرح المجلة للاتاسى: ٢/٥٤٠، تحت المادة: ٤٦٠)

(وكذا فى فتاوى الشامى: ٦/٦٠، باب الاجارة الفاسدة، سعيد)

كل عقد جاز أن يعقده الإنسان بنفسه جاز أن يوكله به غيره لأن الإنسان قد يعجز عن المباشرة بنفسه على اعتبار بعض الأحوال فيحتاج إلى أن يوكل به غيره فيكون بسبيل منه دفعاً للحاجة وقد صح أن النبي صلى الله عليه وسلم وكل بالشراء حكيم بن حزام رضي الله عنه. (الهداية: ٣/١٧٧)

وفى الدر المختار: وكره تحريماً مع الصحة البيع عند الأذان الأول إلا إذا تبايعا يمشيان فلا بأس به لتعليل النهي بالإخلال بالسعي فإذا انتفى انتفى، وقد خص منه من لا جمعة عليه ذكره المصنف. وفي حاشية الطحطاوي: قوله وقد خص منه، أى من كراهية البيع عند الأذان الأول وفيه أنه لم يدخل لعدم العلة فيه حتى يخرج وقد يقال إن من لم تجب عليه الجمعة إذا تبايعا عند الأذان لا كراهة ولو سعيا بعد لأن السعي تبرع، قوله من لا جمعة عليه، كالنساء والمسافرين والمرضى لعدم وجوب السعي عليهم. (الدر المختار مع حاشية الطحطاوى: ٣/٨٣، كوئته. وكذا فى فتاوى الشامى: ٥/١٠١، سعيد)

<u>احكام القرآن:</u>

لم يتعلق النهي بمعنى في نفس العقد وإنما تعلق بمعنى في غيره وهو الاشتغال عن الصلاة وجب أن لا يمنع وقوعه وصحته كالبيع في آخر وقت صلاة يخاف فوتها إن اشتغل به وهو منهي عنه ولا يمنع ذلک صحته لأن النهي تعلق باشتغاله عن الصلاة. (احكام القرآن للجصاص، الجزء الثالث، ص ٤٤٨)

Kifāyatul Muftī:

Where the jumu'ah salāh is impermissible, there is no objection to buying and selling after the adhān of the zuhr salāh. The detestability

of engaging in business after the adhān of Friday is based on listening to the Friday sermon, and this reason is not found where ẕuhr ṣalāh is performed.[1]

Allāh taʿālā knows best.

Asking for a pre-payment/down payment

Question

A person lives in one section of a house belonging to someone else. In addition to the monthly rental, the landlord collects R800 monthly for electricity, water, etc. It is not known how much the tenant is going to use. Furthermore, the landlord collected six-month's rent as a down payment. The objection to this arrangement is that electricity, water, etc. expenses are unknown. Furthermore, at the time when he collected the rent, the benefit which the tenant will enjoy was absent. What is the Sharīʿah ruling?

Answer

According to the Sharīʿah, once benefit is derived in a rental contract, it is obligatory to pay the rent. In this case, the tenant has to pay the rent at the end of the month. If the owner of the house or shop asks for a down payment and the tenant is happy about it, it will be permissible. Even if he laid down the condition of a down payment from the first day, it is permissible for him to ask for it and collect it.

As regards the electricity and water, we can say that the landlord has taken its responsibility on his head. If he collects rent for it, then this is permissible as per a guarantee contract (ʿaqd ḏamān). No matter what, societal norms play a major role in these matters. It is permissible to enter into an agreement as per societal norms and practices.

الأجرة لا تجب بالعقد وتستحق بأحدى معاني ثلاثة إما بشرط التعجيل أو بالتعجيل من غير شرط أو باستيفاء المعقود عليه... وكذا إذا شرط التعجيل أو عجل من شرط لأن المساواة يثبت حقاً له وقد أبطله. (الهداية: ٣/٢٩٤)

[1] *Kifāyatul Muftī*, vol. 3, p. 284.

شرح المجلة:

لا تلزم الأجرة بالعقد المطلق يعنى لا يلزم تسليم بدل الإجارة بمجرد انعقادہا حالاً - والمراد بالعقد المطلق الذي لم يذكر فيہ اشتراط تعجيل الأجرة، وإنما لا يلزم تسليم الأجرة حينئذٍ لأن العقد وقع على المنفعة، وہي تحدث شيئاً فشيئاً، وشأن البدل أن يكون مقابلاً للمبدل، وحيث لا يمكن استيفاؤہا حالاً لا يلزم بدلہا حالاً، إلا إذا شرطہ ولو حكماً بأن عجلہ، لأنہ صار ملتزماً لہ بنفسہ حينئذٍ وأبطل المساواة التي اقتضاہا العقد، فصح، كذا في رد المحتار. (شرح المجلة: ٥٤٩/٢، تحت المادة: ٤٦٦)

وقال فى الهداية: ويجوز أخذ أجرة الحمام والحجام فأما الحمام فلتعارف الناس ولم يعتبر الجهالة لإجماع المسلمين وقال عليہ السلام: ما رآه المسلمون حسناً فهو عند الله حسن، وأما الحجام فلما روي أنہ عليہ السلام احتجم وأعطى الحجام الأجرة ولأنہ استيجار على عمل معلوم بأجر معلوم فيبقع جائزاً. (الهداية:٣٠٣/٣)

وقال فى الهداية: ومن وكل رجلاً بالصلح عنہ فصالح لم يلزم الوكيل ما صالح عنہ إلا أن يضمنہ... لأنہ حينئذٍ ہو مؤاخذ بعد الضمان لا بعقد الصلح. (الهداية: ٢٥٠/٣)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

The fundamental rule in an ijārah is that once the work is done or the duty is carried out, the person becomes eligible for payment, and it becomes obligatory on the one who hired him to make the payment. If an employee asks for a down payment or the landlord asks for a pre-payment of rent, and the tenant accepts the condition, or a company – on its own accord – pre-pays its employees at the beginning of the month, then all these scenarios are permissible through mutual agreement of all parties.[1]

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[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 253.

Allāh taʿālā knows best.

Asking a tenant to repair the lift

Question

We live in a building which has flats on rent. The building has a lift which broke down some days ago. It needs to be repaired and the parts will be brought from overseas. The landlord wants the tenants to bear the cost of the repairs. What is the ruling if societal norm requires the tenant to pay, or if a condition is laid down in the rental contract that the tenant will have to pay?

Answer

Repairs to the building will have to be done by the landlord. However, if societal norms demand that the tenant has to pay, then consideration will be given to societal norms. If the rental agreement states that the tenant will bear the costs, then too he will have to pay. The costs will be born equally by all the tenants.

و عمارة الدار المستاجرة و تطيينها وإصلاح الميزاب وما كان من البناء على رب الدار، وكذا كل ما يخل بالسكنى. (الدر المختار: ٦/٧٩، سعيد)

وعمارة الدار وتطيينها وإصلاح ميزابها على الآجر أما تسييل ماء الحمام و تفريغه على المستاجر، قال فى المحيط: فإن شرط رب الحمام على المستاجر نقل الرماد والسرقين لا يفسد العقد... وفى النوازل: استاجر مكارياً ليحمل له الحنطة إلى مكان كذا فالجوالق والحبل على المكاري إن كان يحمله على دواب المستاجر أو على عنقه فذاک على المستاجر، قال الفقيه أبو الليث: المعتبر في ذلک عادات الناس في تلک البلدة ولو طلب من المكاري أن يدخل بيته فالمعتبر هو العرف. (خلاصة الفتاوىٰ: ٣/١٤٨، الفصل التاسع فيما على الآجر و فيما على المستاجر)

فتاوى الشامى:

وفى البزازية: ولو امتلأ مسيل الحمام فعلى المستاجر تفريغه ظاهراً كان أو باطناً، وفيها وتسييل ماء الحمام وتفريغه على المستاجر وإن شرط نقل الرماد

والسرقين رب الحمام على المستاجر لا يفسد العقد وإن شرط على رب الحمام فسد، فتأمل، ولعله مفرع على القياس أو مبنى على العرف ففى البزازية: وفي استئجار الطاحونة في كرى نهرہا يعتبر العرف. (فتاوى الشامى: ٦/٨٠، سعيد)

شرح المجلة:

وفى الأنقروية عن البزازية: خرج المستاجر من البيت وفيه تراب ظاہر أو رماد، على المستاجر إخراجه، بخلاف البالوعة ، فإنه يلزم المؤجر تفريغها استحساناً، وإن شرط على المستاجر عند العقد جاز، وأنه موافق للعقد، أى وإن كان العرف بخلافه، لأنه حدث بفعله، فالشرط الموافق للقياس وإن كان مخالفاً للعرف، لا يفسد العقد، تأمل. (شرح المجلة للاتاسى: ٢/٦٢٢، المادة: ٥٢٩)

يلزم مراعاة الشرط بقدر الإمكان، أى إمكان الشرط واستطاعته، ولا يلزم ما فوق الاستطاعة... أن الشروط ثلاثة أقسام: قسم يجوز شرعاً، فيه فائدة لمن اشترطه، فهذا يلزم مراعاته... وقال فى البدائع من كتاب المضاربة: الأصل فى الشروط اعتبارہا ما أمكن، وإذا كان القيد مفيداً كان ممكن الاعتبار فيعتبر لقوله عليه الصلاة والسلام: المسلمون عند شروطهم. (شرح المجلة: ١/٢٣٦، المادة: ٨٣)

Allāh ta'ālā knows best.

Renting out a borrowed item

Question

A person borrowed an item and then rented it out to someone else. Is it permissible to do this?

Answer

It is not permissible to rent out a borrowed item.

وليس للمستعير أن يواجر ما استعاره فإن آجره فعطب ضمن لأن الإعارة دون الإجارة والشيء لا يتضمن ما هو فوقه ولأنا لو صححنا لا يصح إلا لازماً لأنه حينئذٍ يكون بتسليط من المعير وفي وقوعه لازماً زيادة ضرر بالمعير لسد باب الاسترداد إلى انقضاء مدة الإجارة فأبطلناه. (الهداية: ٣/٢٨٠، كتاب العارية)

ولا توجر ولا ترهن لأن الشيء لا يتضمن ما فوقه. (الدر المختار: ٥/٦٧٩)

If the person gave it on rent, the rent will not be obligatory because the rental itself is invalid. Rent is not obligatory in an invalid rental contract.

بخلاف الثاني و هو الباطل فإنه لا أجر فيه بالاستعمال. (الدر المختار: ٦/٤٦)

If the original owner permits it to be rented, it ought to be permissible.

وليس للمستعير أن يوجر العارية ولا أن يرهنها بدون إذن المعير. (المجلة: ٣/٣٢٥)

We gauge from the above text that it is permissible if the owner gives permission.

Allāh taʿālā knows best.

The Ramadān salary of a person who resigns in Sha'bān

Question

A teacher resigns in Shaʿbān or Ramaḏān. Will he receive the salary for Ramaḏān?

Answer

The agreement with a madrasah is for the year, but in common practice it refers to the academic year. And this is understood as the end of Shaʿbān. The agreement will therefore be until the end of Shaʿbān. If a condition has been laid down or common practice is that when a madrasah relieves a teacher, it pays him for the month of Ramaḏān, then he ought to be paid for Ramaḏān. Apart from common practice, a holiday is given as a resting period so that the teacher may be mentally at rest for the next year. It therefore makes common sense

to attach the month of Ramaḏān to the next academic year. The academic year will therefore be until the end of Shaʿbān.

وفي مجمع الحقائق: العادة المطردة تنزل منزلة الشرط، حتى لو باع التاجر فى السوق شيئاً بثمن، ولم يصرحا بحلول ولا تأجيل، وكان المتعارف فيما بينهم أن البائع يأخذ من الثمن كل جمعة قدراً معلوماً، انصرف البيع إليه بلا بيان، لأن المعروف عرفاً كالمشروط شرطاً. (شرح المجلة لمحمد الاتاسى: ١/٩٥، المادة: ٤١)

الاشباه والنظائر:

واعلم أن اعتبار العادة والعرف يرجع إليه فى الفقه في مسائل كثيرة، حتى جعلوا ذلک أصلاً، فقالوا فى الأصول في باب ما تترک به الحقيقة: تترک الحقيقة بدلالة الاستعمال والعادة، ہکذا ذکر فخر الإسلام...

ومنها: البطالة فى المدارس كأيام الأعياد ويوم عاشوراء وشهر رمضان في درس الفقه لم أرها صريحة في كلامهم، والمسألة على وجهين، فإن كانت مشروطة لم يسقط من المعلوم شيء، وإلا فينبغي أن يلحق ببطالة القاضي. وقد اختلفوا في أخذ القاضي ما رتب له من بيت المال في يوم بطالته، فقال فى المحيط: إنه يأخذ في يوم البطالة، لأنه يستريح لليوم الثاني، وقيل: لا يأخذ، انتهى. وفى المنية: القاضي يستحق الكفاية من بيت المال في يوم البطالة فى الأصح، واختاره في منظومة ابن وہبان، وقال إنه الأظهر (منظومة ابن وہبان: ١/٢٨٨، فصل من كتاب ادب القاضى) فينبغي أن يكون كذلک فى المدارس، لأن يوم البطالة للاستراحة، وفى الحقيقة يكون للمطالعة والتحرير عند ذى الهمة. (الاشباه والنظائر: ١/٢٦٨، ٢٧٢، القاعدة السادسة العادة محكمة)

كذا فى رد المحتار: ٤/٣٧٢، مطلب فى استحقاق القاضى والمدرس الوظيفة فى يوم البطالة، سعيد)

Imdād al-Ahkām:

Since the teacher did not work in Shawwāl (whether the reason is from the teacher or from the committee, but he certainly did not work), he is not eligible for the salary of Ramadān.

لأن شرط الاستحقاق هو العمل في شوال ولم يوجد، وإذا فات الشرط فات المشروط بخلاف ما إذا لم يعمل بحصول الرخصة والإذن من المتولى فإنه في حكم العمل كما لا يخفى. والله أعلم. (امداد الاحكام: ٣/٥٧٤)

Imdād al-Fatāwā:

A salary is specifically for the days when a person works. However, holidays are attached subserviently to the days of work so that the person may take a rest and be able to do the work during the work days...If he is asked to leave at the end of Shaʿbān, he will not receive a salary. Where he is not retrenched, he will receive the salary until the end of Ramadān provided he worked in Shawwāl as well.[1]

Fatāwā ʿUthmānī:

Preconditioning the salary of Ramadān (a holiday) to coming to work in the beginning of Shawwāl does not invalidate the contract because this precondition has become common and well-known. Shaykh al-Muhaddithīn Hadrat Sahāranpūrī rahimahullāh has stated this explicitly in his *Fatāwā Khalīlīyyah*: If the well-known and common precondition is established, then in all these cases, the teacher will be eligible for a full salary in the disputed incident.[2]

Awareness of this condition is clear on the basis of several reasons. Some of them are:

1. Awareness of this condition among the Dīnī madāris is so common that it needs no explanation. Almost all the madāris practise on it.
2. This condition is also known among the jurists. Eligibility for a salary during holidays is so that the employee can take a rest and be re-energized to work with enthusiasm. If he has no intention of working after the holiday, how can he be eligible for a salary for the holidays?

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[1] *Imdād al-Fatāwā*, vol. 3, p. 348.

[2] *Fatāwā Khalīlīyyah*, vol. 1, p. 248.

3. This condition is totally in line with protecting waqf property and spending it correctly. The zakāh and other donations and payments which the madāris receive are trusts (amānah) from the donors and students. Caution demands that this trust not be given without having worked for it or without something in exchange. Therefore, there has to be work (as is the case during working days) or assumed (as in the case of holidays when the employee has the intention of working after that). If not, paying a salary will be a questionable action...Muftī Mahmūd Ashraf ʿUthmānī Sāhib.

The following is a fatwā of Hadrat Maulānā Muftī Muhammad Taqī ʿUthmānī Sāhib:

It is permissible to make a salary for the Ramadān holiday to be dependent on working in Shawwāl or to not make it dependent. The permissibility of not making it dependent is clear because it means that in the work contract, the one-month payment which is laid down without working in that month is like an additional wage for the entire year's work. And this is known. It is permissible through the permission of both parties. As for the permissibility of making it dependent – one reason for it could be what Hadrat Maulānā Khalīl Ahmad Sāhib made reference to in his answer [quoted previously]. Another reason could be that the salary for the holiday is considered to be a precondition to a renewal of the contract. In other words, if the contract is renewed in Shawwāl for the next year, then the employee will be paid for the holidays. It is as though the contract ended in Shaʿbān, and when it is renewed in Shawwāl, the salary for the holidays has been given supplementarily with the salary of Shawwāl.[1]

Nizām al-Fatāwā:

It is correct to say that the Ramadān holiday is given for rest. After taking the rest, the employee will be able to work with renewed energy. This is common in most of the madāris. Based on this, teachers who will not be returning the next year will not be eligible for a salary for Ramadān.[2]

Further reading: *Fatāwā Khalīlīyyah*, vol. 1, p. 244; *Fatāwā ʿUthmānī*, vol. 3, pp. 366-374; *Qāmūs al-Fiqh*, vol. 1, pp. 497-498; *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 235; *Fatāwā Mahmūdīyyah*, vol. 15, p. 529.

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[1] *Fatāwā ʿUthmānī*, vol. 3, pp. 368, 373, 374.

[2] *Nizām al-Fatāwā*, vol. 1, p. 332.

Allāh ta'ālā knows best.

Setting a time-period in an ijārah

Question

A person hired a company to construct a house. He laid down the condition that the house must be completed within three months. Is this permissible?

Answer

An ijārah of this nature is permissible and valid.

وفى الأصل أيضاً لو شرط على الخباز أن يخبز لہ ہذہ العشرة المخاتيم دقيقاً وشرط عليہ أن يفرغ عنہ اليوم تجوز ہذہ الإجارة عندہم جميعاً وإن ذكر الوقت والعمل كذا فى الذخيرة. (الفتاوى الہندية: ٤/٤٢٤)

فتاوىٰ قاضيخان:

وذكر الحاكم فى المختصر ما ہو إشارة إلى ذلك وقال: ألا ترى أنہ لو استاجرہ ليعمل لہ ہذا العمل بدرہم وشرط عليہ أن يفرغ منہ اليوم كان جائزاً. (فتاوىٰ قاضيخان على ہامش الہندية: ٢/٣٣٢)

امداد الاحكام:

قال فى العالمكيريہ: وما يتصل بہذا الفصل إذا جمع في عقد الإجارة بين الوقت والعمل إذا استاجر رجلاً ليعمل لہ عملاً إلى الليل بدرہم صباغة أو خبزاً أو غير ذلك فالإجارة فاسدة في قول أبي حنيفة وفي قولہما يجوز استحساناً ويكون العقد على العمل دون اليوم حتى إذا فرغ منہ نصف النہار فلہ الأجر كاملاً وإن لم يفرغ فى اليوم فلہ أن يعملہ فى الغد.

We learn from the above that the scenario as described in the question is not permissible according to Imām Abū Hanīfah rahimahullāh. This is because it combines the work and a time-period. Imām Muhammad and Imām Abū Yūsuf rahimahullāh are of the view that it is

permissible out of kindness. This ijārah contract will not be on the time but the work.[1]

وللاستزادة انظر: (وكذا فى رد المحتار: ٦/٥٩، باب الاجارة الفاسدة، سعيد. وتبيين الحقائق: ٥/١٣١، ملتان. وشرح المجلة: ٢/٥٣٩، المادة: ٤٦٠، والفقه الحنفى فى ثوبه الجديد: ٤/٤٠٣)

Allāh taʿālā knows best.

Asking a tenant to vacate because of some danger

Question

A person renting a certain house has the contagious disease of AIDS. There is the danger of the neighbours' children contacting this disease. Can the landlord ask this tenant to vacate the house?

Answer

It is better not to ask him to vacate the premises. Yes, the people should be informed so that the disease does not spread. However, if the lease has expired or there is an overriding possibility of harm to others, the tenant can be asked to excuse himself. There is room for its permissibility. Yes, if there is no separate place for those suffering from this disease, they should not be removed because no matter where they go, it will be a cause of difficulty for them and a reason for their removal from that place.

وفي حاشيتها لأبى السعود عن البيري: والحاصل أن كل عذر لا يمكن معه استيفاء المعقود عليه إلا بضرر يلحقه في نفسه أو ماله يثبت له حق الفسخ، قال البيري: يؤخذ منه الرجم الذي يقع كثيراً فى البيوت ويقال إنه من الجان عذر في فسخ الإجارة لما يحصل من الضرر الخ ما ذكره، أقول: يظهر هذا لو كان الرجم لذات الدار أما لو كان لشخص مخصوص فلا.

(فرع كثير الوقوع) قال في لسان الحكام: لو أظهر المستاجر فى الدار الشر كشرب الخمر وأكل الربا والزنا واللواطة يؤمر بالمعروف وليس للمؤجر ولا

[1] *Imdād al-Ahkām*, vol. 3, p. 541.

لجيرانہ أن يخرجوه فذلک لا يصير عذراً فی الفسخ ولا خلاف فيہ للائمة الأربعة، وفی الجواہر: إن رأی السلطان أن يخرجہ فعل... أقول: وفي جامع الفصولين كل فعل ہو سبب نقص المال أو تلفہ فہو عذر لفسخہ. (فتاوی الشامی: ٦/٨١، باب فسخ الاجارة، سعيد)

(وكذا فی لسان الحكام، ص ٣٦٨، الفصل الثامن عشر فی الاجارة)

Allāh taʿālā knows best.

Taking a payment for reciting the Qur'ān

Question

The Egyptian qurrā' who come to this country ask for a payment for their recitation. Is it permissible to pay them and then listen to their recitation?

Answer

It is not permissible to take a payment for a recitation alone. If, without making a precondition of payment, people happen to give the qārī something, it will be permissible for him to accept it. This is what is learnt from the verdicts of our seniors.

ʿAllāmah Shāmī rahimahullāh has written a monograph dedicated to this subject. It is included in *Rasā'il Ibn ʿĀbidīn.*

The following are some of the proofs for impermissibility:

1.

عن عبد الرحمن بن شبل، أنہ سمع رسول الله صلى الله عليہ وسلم يقول: اقرءوا القرآن، ولا تغلوا فيہ، ولا تجفوا عنہ، ولا تأكلوا بہ، ولا تستكثروا بہ. (رواه ابو يعلى فی مسنده، ١٥١٥/١٩٥/٢، مسند عبد الرحمن بن شبل الانصاری)

وبہامشہ قال: اخرجہ احمد (٤٤٤/٣،٤٢٨) والطحاوی (١٢/٢) والطبرانی فی الكبير والاوسط والبزار قال فی المجمع (٩٥/٤): رجالہ ثقات، وذكره (١٦٧/٧)

ايضاً، وعزاه السيوطى فى الجامع الصغير (٥١/١) الى البيهقى ايضاً، وقال الحافظ: سنده قوى، انتهىٰ)

وراوه ابن ابى شيبة فى مصنفہ: ٥/٢٤٠/٧٨٢٥، المجلس العلمى. وقال الشيخ محمد عوامة فى تعليق ہذا الحديث: رواه احمد والطبرانى وابو يعلى والطحاوى والبيهقى فى الشعب وعبد الرزاق، واسناده قوى، انتهى ملخصاً)

> Rasūlullāh sallallāhu ʿalayhi wa sallam said: Read the Qur’ān. Do not be dogmatic about it. Do not discard it. Do not use it as a source of sustenance. Do not use it to acquire more wealth.

2.

> عن سليمان بن بريدة عن ابيہ قال: قال رسول الله صلى الله عليہ وسلم: من قرء القرآن يأكل بہ الناس جاء يوم القيامة ووجہہ عظمة ليس عليہ لحم. (رواه البيهقى فى شعب الايمان: ٢/٥٣٢/٢٣٨٤)

وروا ابن ابى شيبة فى مصنفہ عن زاذان مرسلاً، وقال الشيخ محمد عوامة فى تعليق ہذا الحديث: وہذا لہ حكم الرفع، فہو مرسل بإسناد حسن، زاذان: ہو الكندى، وہو تابعى صدوق، وقد رواه ابو نعيم فى الحلية (٤/١٩٩)، من طريق احمد بن يونس، عن الثورى بہ. ورواه مرفوعاً من حديث بريدة بن حصيب رضي الله عنه: البيهقى فى الشعب (٢٦٢٥،٢٣٨٤) وفى إسناده حفيد الفضل بن دكين: احمد بن ميثم بن الفضل بن دكين، ذكره ابن حبان فى المجروحين (١/١٤٨) وروى ہذا الحديث وحديثاً آخر لہ، وقال: ہذان حديثان لا أصل لهما، وذكره ابن الجوزى فى العلل المتناہية (١/١١٧) انتهى. (المصنف لابن ابى شيبة مع التعليق: ٥/٢٣٨/٧٨٢٤)

هذه الأحاديث وإن كان في بعضها مقال، لكنه يويد بعضها بعضاً. (رسائل ابن عابدين)

> Rasūlullāh sallallāhu ‘alayhi wa sallam said: The one who reads the Qur’ān to gain sustenance from people through it shall come on the day of Resurrection while his face will be only a skeleton, having no flesh on it.

Observe the following juridical texts:

لأن ما أجازوه، إنما أجازوه في محل الضرورة كالاستيجار لتعليم القرآن أو الفقه أو الأذان أو الإمامة خشية التعطيل لقلة رغبة الناس فى الخير، ولا ضرورة فى استئجار شخص يقرأ على القبر أو غيره. (فتاوى الشامى: ٦/٦٩١، باب الوصية للاقارب وغيرهم، سعيد)

وقيل: لا يجوز الوصية باستئجار القاري ليقرء القرآن وإن كان القاري معيناً وهو قول أبي حنيفة. (المحيط البرهانى: ٢٣/٣٩، الرياض، السعودية)

وفي رد المحتار: وإن القراءة لشيء من الدنيا لا تجوز، وإن الآخذ والمعطي آثمان، لأن ذلك يشبه الاستئجار على القراءة... كما أوضحت ذلك في شفاء العليل. (رد المحتار: ٢/٧٣، مطلب فى بطلان الوصية بالختمات والتهاليل، سعيد)

In short, it is not permissible to take a payment for a recitation alone. The texts, commentaries and verdicts all contain its prohibition.

Yes, there is leeway if the person is given something as a gift.

عن أنس بن مالك رضي الله عنه أن رجلاً من كلاب سال رسول الله صلى الله عليه وسلم عن عسب الفحل فنهاه، فقال يا رسول الله! إنا نطرق الفحل فنكرم فرخص لهم فى الكرامة. (رواه الترمذى، وقال هذا حديث حسن، ١/٢٤٠)

Kifāyatul Muftī:

The payment for a lecture should not be specified from before hand, and the lecturer too must not have it in his heart that he will certainly receive something. He must deliver the lecture solely for Allāh's sake. If someone then gives him an amount as a gift, it will be permissible.

Imdād al-Fatāwā:

Question: If a marriage is performed by a judge in the presence of the representative and two witnesses, can the wedding party give something of monetary value to the judge for performing the marriage? They are giving it happily and without it being demanded.

Answer: As long as they are giving it happily and without it being demanded, it will be permissible to give him something.

There are four scenarios when something is given to someone:

1. Something is acquired in return for something which has a price.
2. Something is acquired in return for something which has no price.
3. Something is acquired with a good heart without a return for something.
4. Something is acquired by force without a return for something.

Hadrat Thānwī rahimahullāh writes with reference to the third scenario:

The third scenario is halāl because it is a gift.[1]

Note: It should be borne in mind that the qurrā' who come from overseas bear the hardships of travel. Arrangements must be made for their travel expenses, boarding and other expenses. This is not classified as payment for recitation of the Qur'ān. Yes, it is not permissible to pay them for conducting a Qur'ān recitation.

Some scholars consider payment to be permissible. Observe the following:

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[1] *Imdād al-Fatāwā*, vol. 2, p. 265.

قلت: وكذا ينبغي أن يكون القول ببطلان الوصية لمن يقرأ عند قبره بناء على القول بكراهة القراءة على القبور أو بعدم جواز الإجارة على الطاعات، أما على المفتى به من جوازهما فينبغي جوازها مطلقاً وتمامه في حواشى الأشباه من الوقف. (الدر المختار: ٦/٦٩، سعيد)

وفي حاشية الطحطاوي: والمختار جواز الاستيجار على قراءة القرآن على القبور مدة معلومة. (حاشية الطحطاوى على الدر المختار: ٤/٣٠، كوئته)

وفى البحر الرائق: وفى الحاوي لكرابيسي إذا استأجره ليختم عنده القرآن ولم يسم له أجراً ليس له أن يأخذ أقل من خمسة وأربعين درهماً شرعاً أما إذا سمى أجراً لزم ما سمى لكن يأثم المستاجر إذا عقد على أقل من خمسة وأربعين درهماً إلا أن يهب المستاجر ما بقي من تمام القدر أو يشترط أن يكون ثواب ما فوقه لنفسه فلا يأثم وكذا إذا قال: اقرأ بقدر ما قدرت عليه فله من الأجر بقدر ما قرأ وهذا يجب حفظه كما فى المبسوط، أقول: وهذا في عرفهم أما في زماننا فيجوز ذلك. (تكملة البحر الرائق: ٨/٢٠، باب الاجارة الفاسدة، كوئته)

However, ʿAllāmah Shāmī raḫimahullāh says that these views are not preferred. He has dedicated a monograph on this subject. It is titled:

شفاء العليل وبل الغليل في حكم الوصية بالختمات التهاليل

He goes into a detailed examination of the subject and responds to those who hold the view of permissibility.

أقول: ليس كذلك لما فى الولوالجية لو زار قبر صديق أو قريب له وقرأ عنده شيئاً من القرآن فهو حسن أما الوصية في ذلك فلا معنى لها، ولا معنى أيضاً لصلة القاري لأن ذلك يشبه استئجاره على قراءة القرآن وذلك باطل ولم يفعله أحد من الخلفاء، وفي كونه مما أجيز الاستئجار عليه تأمل، لأن ما

أجازوه إنما أجازوه في محل الضرورة كالاستئجار لتعليم القرآن أو الفقه أو الأذان أو الإمامة خشية التعطيل لقلة رغبة الناس فى الخير ولا ضرورة في استئجار شخص يقرأ على القبر أو غيره. (فتاوى الشامى: ٦/٦٩١، سعيد)

Answer to the text of ʽAllāmah Sayyid Ahmad Tahtāwī rahimahullāh:

1. ʽAllāmah Sayyid Ahmad Tahtāwī rahimahullāh wrote an appraisal to the above-mentioned book of ʽAllāmah Shāmī rahimahullāh. It has been printed with the original book. After praising Allāh taʽālā and sending salutations to Rasūlullāh sallallāhu ʽalayhi wa sallam, he writes:

أما بعد: فقد اطلعت على هذه الرسالة الثمينة التي هي لنفائس الصواب خزينة المسماة بـ "شفاء العليل وبل الغليل في حكم الوصية بالختمات والتهاليل" فوجدتها رفيعة الشان زاهية العرفان... تكفلت بجمع أصح النصوص دون أضعفها... (رسائل ابن عابدين، ص ١٩٩)

We conclude from this text of ʽAllāmah Sayyid Ahmad Tahtāwī rahimahullāh that he retracted from his previous view.

2. ʽAllāmah Sayyid Ahmad Tahtāwī rahimahullāh was initially of the view that it is permissible. However, he prohibited it because of the accompanying evils.

Some of the evils include: Devouring the wealth of orphans, playing drums, intermingling of males and females in the assembly, disturbance to those who are asleep, etc. Based on these evils, the ʽAllāmah rahimahullāh prohibited hiring someone for the sake of Qur'ān recitation.

Answer to the text of ʽAllāmah Ibn Nujaym Misrī rahimahullāh:

ʽAllāmah Shāmī rahimahullāh writes:

ثم رأيت العلامة الشيخ خير الدين الرملي في حاشيته على البحر رد على صاحب البحر... حيث قال:

أقول: المفتى به جواز الأخذ استحساناً على تعليم القرآن لا على قراءة المجردة كما صرح به فى التاتارخانية حيث قال لا معنى لهذه الوصية ولصلة القارئ

بقراءته لأن هذا بمنزلة الأجرة والإجارة في ذلك باطل وهي بدعة ولم يفعلها أحد من الخلفاء وقد ذكرنا مسئلة قرا ءة القرآن. (رسائل ابن عابدين، ص ١٦٨)

قال العلامة الشامي: ومن أقوى الدلائل على رده أيضاً عبارة الولوالجية وخزانة الفتاوى فإن فيهما التصريح ببطلان هذه الوصية مع التصريح بجواز القراءة عند القبر، فكيف يصح جعل بطلان الوصية مبنياً على القول بعدم جواز القراءة على القبر كما زعمه فى البحر وإنما هو مبني على بطلان الاستئجار على القراءة الذي لم يستثنه أحد من المتأخرين. (رسائل ابن عابدين، ص ١٦٩)

Observe some of the texts of those who hold the view of impermissibility:

وفى الولوالجية :ولو زار قبر صديق أو قريب له وقرأ ...فهو حسن، أما الوصية في ذلك فلا معنى له... وذلك باطل. (الفتاوى الولوالجية: ٥/٣٣٦، بيروت)

قال العلامة الشامى: ورأيت أيضاً النقل ببطلان هذه الوصية وأنها بدعة عن الخلاصة والمحيط السرخسي والبزازية. (رسائل ابن عابدين، ص ١٦٨)

وفي خلاصة الفتاوىٰ: وفى النوازل: رجل أوصى لقارى القرآن يقرأ عند قبره بشيء فالوصية باطلة. (خلاصة الفتاوىٰ: ٤/٢٣٤، الفصل الرابع فى الدفن والكفن وما يتعلق بها)

إذا أوصى أن يدفع إلى إنسان كذا من ماله كذا ليقرأ القرآن على قبره فهذه الوصية باطلة، وقيل إذا كان القاري معيناً ينبغي أن يجوز الوصية له على وجه الصلة دون الأجر، وقيل لا يجوز وإن كان القاري معيناً وهو قول أبي حنيفة، وكان يقول: لا معنى لهذه الوصية ولصلة القاري بقراءته لأن هذا بمنزلة الأجرة والإجارة في ذلك باطلة، وهي بدعة ولم يفعلها أحد من الخلفاء

رضوان الله تعالىٰ عليهم أجمعين وقد ذكرنا مسألة قراءة القرآن على القبور في كتاب الاستحسان. (المحيط البرہانی: ۲۳/۳۹، الرياض، السعودية)

إذا أوصى أن يدفع إلى إنسان كذا من مالہ ليقرأ القرآن على قبره فالوصية باطلة لا تجوز. (الفتاوى التاتارخانية: كتاب الوصايا، فى الفصل التاسع والعشرين)

وفى الطريقة المحمدية: (ومنها) أى من أمور مبتدعة ابتدعها الجهلة المغرورون لا أصل لها فى الشريعة (الوصية) من الميت ...(بإعطاء دراہم معدودة) معلومة (لمن يتلو) أى يقرأ (القرآن لروحہ) أى لروح الميت. (الطريقة المحمدية مع شرحہ الحديقة الندية: ۲/۷٤۲، الفصل الثالث)

وقال العلامة الشامي: إن القراءة في نفسها عبادة يرجى بها الثواب وقد عرفوا الرياء بأن يراد بالعبادة غير وجہہ تعالىٰ فالقاري بالأجرة ثوابہ ما أراد القراءة لأجلہ وہو المال. (رسائل ابن عابدين، ص ١٦٧)

ʽAllāmah Shāmī rahimahullāh draws our attention to an important point. Sometimes, a jurist quotes a ruling which is not what is issued as a fatwā. Those who come later on depend on that ruling and quote it. In this way, the number of those who quote it increases whereas it is a ruling which is not issued as a fatwā. The same thing happened in the above case.

قلت: وقد يتفق قول في نحو عشرين كتاباً من كتاب المتأخرين و يكون القول خطأ أخطأ بہ أول واضع لہ فيأتي من بعده وينقلہ عنہ. (شرح عقود رسم المفتى، ص ٥)

Although *ʽĀlamgīrīyyah* and *Jauharah* state that it is permissible to take a payment for Qur'ān recitation at a grave provided that the time is specified when the agreement is made, ʽAllāmah Shāmī rahimahullāh has refuted this verdict. Therefore the correct view is that it is not permissible to accept a payment for reciting the Qur'ān.

لكونه استئجارا للطاعة وهو لا يجوز واستثناء التعليم والأذان والإمامة للضرورة ولا ضرورة فيه. (صرح به في رد المحتار). (إمداد الأحكام: ج ٣، ص ٥٥٧. وكذا في معلم الفقه ترجمة اردو مجموعة الفتاوى: ج ٢، ص ٢٤٧).

Allāh ta'ālā knows best.

An ijārah which is attached to the future

Question

Is it permissible to attach an ijārah to the future. For example, someone says: "I gave you this house on rent after one month."

Answer

An ijārah of this nature is permissible according to Hanafī jurists.

إذا أضاف الإجارة إلى وقت فى المستقبل بأن قال: آجرتک داري ہذه غداً أو ما أشبہ فإنہ جائز فلو أراد نقضها قبل مجيء الوقت فعن محمد فيہ روايتان في رواية قال لا يصح النقض وفى رواية قال يصح،كذا فى المحيط. (الفتاوى الهندية: ٤/٤١)

وفى الدر المختار: وتصح الإجارة وفسخها والمزارعة والمعاملة... حال كون كل واحد مما ذكر مضافاً إلى الزمان المستقبل كآجرتک أو فاسختک راس الشهر صح بالإجماع. (الدر المختار: ٦/٩٣، مسائل شتىٰ)

وفى المحيط: إذا أضاف العقد إلى وقت فى المستقبل بأن قال: آجرتک داري ہذه غداً وما أشبہہ، وأنہ جائز بناء على الأصل الذي ذكرنا أن الإجارة تنعقد ساعة فساعة على حسب حدوث المنفعة، فالعقد في حق الحكم كالمضاف إلى وجود المنفعة فمبنى الإجارة في حق الحكم على الإضافة كيف تكون الإضافة مانعة صحة الإجارة... وفي فتاوى أبى الليث إذا قال لغيره: إذا جاء رأس الشهر فقد آجرتک ہذه الدار، إذا جاء غد فقد آجرتک ہذه الدار يجوز

وإن كان فيہ تعليقاً. (المحيط البرہانی: ۹/۸۷، کتاب الاجارات، مکتبہ رشیدیہ). وكذا فی الشامی: وحاشية الطحطاوی علی الدر: ٤/٥١)

Allāh taʿālā knows best.

Employment in a bank

Question

A person works in a bank in South Africa. Is such an employment permissible? Is his salary halāl? Is there any lawful type of work in a bank? What is the ruling if a business has 100% interest-based transactions? Kindly explain in detail.

Answer

A bank employment which entails purely usurious accounting is impermissible, and the salary is not halāl because it entails aiding in usury. As per the teachings of the Hadīth, it is not permissible to aid in usury in any way. Yes, it is permissible to be employed in those departments of a bank which are not related to usury, e.g. a person who runs errands for the bank, a cook in the bank, a driver, a sweeper and cleaner, etc. The income of such a person is halāl.

Some scholars are of the view that in addition to usurious transactions, banks engage in import/export transactions, payment of electricity and telephone accounts, etc. In other words, they also engage in halāl business. Therefore, if the employment is related to these halāl jobs, it ought to be permissible. Yes, the person must certainly not get involved in usurious transactions. Nonetheless, it is best to abstain from such employment.

> عن جابر رضي الله عنه قال: لعن رسول الله صلى الله عليہ وسلم: آكل الربا وموكلہ، وكاتبه وشاهديه وقال هم سواء. (رواه مسلم: ٢/٢٨، باب الربا، قديمی)
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> Rasūlullāh sallallāhu ʿalayhi wa sallam cursed the devourer of usury, the one who appoints another over it, the one who records it, and those who are witness to the transaction. He said: They are equal [in sin].

Imdād al-Muftīyyīn:

The Hadīth curses the person who aids in usurious transactions.[1]

Fatāwā Bayyināt:

It is not permissible to work in a bank. Similarly, it is not permissible to accept a salary from a bank. This is because a bank engages in usurious transactions. Working in a bank entails aiding in these transactions. Accepting a salary from a bank entails receiving a salary from usury. Rasūlullāh sallallāhu ʿalayhi wa sallam cursed the one who collects interest, pays it, records it, is a witness to it, and anyone else who aids in it in any way. He said that they are all equal in the sin.

عن جابر رضي الله عنه قال: لعن رسول الله صلى الله عليه وسلم: آكل الربا وموكله، وكاتبه وشاهديه وقال هم سواء.

(رواه مسلم: ٢/٢٨، باب الربا، قديمى)

> Rasūlullāh sallallāhu ʿalayhi wa sallam cursed the devourer of usury, the one who appoints another over it, the one who records it, and those who are witness to the transaction. He said: They are equal [in sin].[2]

Nizām al-Fatāwā:

It is permissible to do such work in a bank which is permissible in itself. Every type of employment in a bank is not impermissible.[3]

Fatāwā Rahīmīyyah:

When all transactions in a bank are based on interest, it is not permissible to accept employment in it. A Hadīth states:

عن جابر رضي الله عنه قال: لعن رسول الله صلى الله عليه وسلم: آكل الربا وموكله، وكاتبه وشاهديه وقال هم سواء.

(رواه مسلم: ٢/٢٨، باب الربا، قديمى)

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[1] *Imdād al-Muftīyyīn*, vol. 2, p. 703.

[2] *Fatāwā Bayyināt*, vol. 4, p. 71.

[3] *Nizām al-Fatāwā*, vol. 1, p. 193.

> Rasūlullāh sallallāhu ʿalayhi wa sallam cursed the devourer of usury, the one who appoints another over it, the one who records it, and those who are witness to the transaction. He said: They are equal [in sin].

This proves that it is impermissible and a sin to aid in any sinful activity and to take any part in it.

Allāh taʿālā says:

وَلَا تَعَاوَنُوْا عَلَى الْإِثْمِ وَالْعُدْوَانِ.

> Do not help each other in sin and transgression.[1]

Islām Aur Jadīd Maʿāshī Masā'il:

Question: From which departments of a bank is the employees' income permissible?

Answer: Income from all those departments which involve usury is impermissible. This includes usurious transactions, recording them, being witness to them, or aiding them in any way. Other dealings which do not involve usury are permissible. For example, a person who takes a cheque and gives it to the cashier, a driver, a cleaner, etc.

Kitāb al-Fatāwā:

The bank employee who is involved in the accounting, recording, writing, paying and receiving of interest is included in the prohibition. He is directly aiding in the sin. This employment is therefore impermissible for him. However, lower-level employment is permissible (e.g. a cleaner, a guard, etc. who have nothing to do with the actual transactions, and who are responsible for the protection of the building itself).

Further reading: *Kifāyatul Muftī*, vol. 7, pp. 307, 310; *Fatāwā ʿUthmānī*, vol. 3, p. 395.

Allāh taʿālā knows best.

The issue of a bank salary

The fundamental principle here is that if the majority of the income is harām, then everything from that wealth is harām; whether it is a salary or money. However, the majority of the money which is in a

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[1] Sūrah al-Mā'idah, 5: 2. *Fatāwā Rahīmīyyah*, vol. 9, p. 289.

bank is not harām. Its foundation is capital. It contains the money of the bank owners and depositors. They are the majority. Therefore, the majority of the wealth is not harām. Thus, if a person does some lawful work there and collects money for it, it is permissible.

Hadrat Muftī Taqī Sāhib writes:

There are four sources of income for a bank:

1. The original capital.
2. The money of depositors.
3. Income from usury and other harām activities.
4. Income from lawful services.

From the above four, only number three is harām. The other three cannot be said to be harām. Since the majority in every bank comprises of numbers one and two, we cannot say that harām is in the majority in the sum total. Thus, a salary for a permissible work can be accepted from it.

This is the basis on which the 'ulamā' issued the verdict stating that if a bank employment entails no harām work in it, it will be a lawful employment. Nonetheless, caution demands that a person abstains from it as well.[1]

Imdād al-Ahkām:

If an employee knows that the salary which is being given to him is from an invalid sale or from the income of usury, then it is not permissible for him to accept it. If the monies are mixed up and he cannot identify whether the money is from a valid or invalid sale, his salary is lawful.[2]

قال فى الأشباه: غلب على ظنه أن أكثر بياعات أهل السوق لا تخلو عن الفساد، فإن كان الغالب هو الحرام تنزه عن شرائه، لكن مع هذا لو اشتراه يطيب له، قال الحموي: ووجهه أن كون الغالب هو الحرام لا يستلزم كون المشترى حراماً، لجواز كونه من الحلال المغلوب والأصل الحل. (الاشباه مع شرح الحموى ص ٩٢)

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[1] *Fatāwā 'Uthmānī*, vol. 3, p. 395.

[2] *Imdād al-Ahkām*, vol. 3, p. 533.

قال الشيخ دام ظله: إذا أعطى الموجر الأجرة من المال المخلوط والأجير عالم بالخلط، فكيف يجوز له أخذها والخبث تمكن بها بالخلط، قلت: هذا على قولهما، وهو الأحوط، ولكن على قول أبي حنيفة فالخلط مستهلك، فإن قيل هذا يفيد ملكه لأجل استمتاعه به، قلت: عبارات الفتاوىٰ تدل على جواز الاستمتاع أيضاً على قوله قال في فتاوىٰ قاضيخان: إن كان غالب مال المهدى من الحلال، لا بأس بأن يقبل الهدية ويأكل ما لم يتبين عنده أنه حرام، لأن أموال الناس لا تخلو عن قليل حرام فيعتبر الغالب. (امداد الاحكام: ٣/٥٣٣)

Allāh taʿālā knows best.

Employment in a shop which sells lawful and unlawful items

Question

A Muslim works in a non-Muslim restaurant where alcohol, pork and other unlawful items are sold. Is his income halāl?

Answer

It is permissible for a Muslim to work for a non-Muslim business provided he is not directly involved in serving the alcohol, pork, etc. to the non-Muslim customers, or is not directly involved in the sale and purchase of these items. It is not permissible for a Muslim to carry out these tasks directly.

> عن أنس بن مالك رضي الله عنه لعن رسول الله صلى الله عليه وسلم فى الخمر عشرة عاصرها ومعتصرها وشاربها وحاملها والمحمولة إليه وساقيها وبايعها وآكل ثمنها والمشترى لها والمشتراة له. (رواه الترمذى: ١/٣٨٠، باب ما جاء فى بيع الخمر)
>
> Rasūlullāh sallallāhu ʿalayhi wa sallam cursed ten types of people with respect to alcohol: the one who squeezes it out, the one for whom it is squeezed, the one who drinks it, the one who carries/transports it, the one for whom it is carried, the one who offers it to drink, the one who sells it, the one who consumes

its income, the one who buys it and the one for whom it is bought.

الفتاوى الهندية:

وإذا استاجر الذمي مسلماً ليحمل له ميتة او دماً يجوز عندهم جميعاً ...ولو استاجر مسلماً ليرعى له الخنازير يجب أن يكون على الخلاف كما فى الخمر ولو استاجره ليبيع له ميتة لم يجز هكذا فى الذخيرة، مسلم آجر نفسه من مجوسي ليوقد له النار لا بأس به كذا فى الخلاصة... وسئل إبراهيم بن يوسف عمن آجر نفسه من النصارى ليضرب لهم الناقوس كل يوم بخمسة ويعطى كل يوم خمسة دراهم في ذلك العمل وفي عمل آخر درهمان قال: لا يواجر نفسه منهم ويطلب الرزق من طريق آخر ويكره له أن يؤاجر نفسه منهم لعصر العنب ليتخذوا منه خمراً كذا فى الحاوى للفتاوى. (الفتاوى الهندية: ٤/٤٥٠)

وكذا في فتاوى قاضي خان على هامش الهندية: ج ٢، ص ٣٢٤.

Qāmūs al-Fiqh:

Just as it is impermissible to do anything which is unlawful and against the Sharīʿah, it is impermissible to aid in such works and to be employed for them...Therefore, it is impermissible to be employed by banks, insurance companies, liquor houses and brothels and to do work in which the person becomes a means for usury, gambling, alcohol or prostitution; invites people to it, records the usury accounts, etc. Yes, a person may be employed in these places as a cleaner, menial worker, etc. because he is not directly involved in that business.[1]

Fiqhī Maqālāt:

It is permissible for a Muslim to work in a non-Muslim restaurant provided he does not serve the alcohol, pork or other unlawful items to the non-Muslim customers. It is haram to serve alcohol to others...It is clear from the verdict of Hadrat ʿAbdullāh ibn ʿAbbās radiyallāhu ʿanhu that if the manufacture, sale and purchase of alcohol is common

[1] *Qāmūs al-Fiqh*, vol. 1, p. 500.

in a place; it is impermissible for a Muslim to choose employment in the alcohol industry of that area.[1]

Fatāwā Mah̲mūdīyyah:

When an action is unlawful, employment in that industry is also unlawful. A person must look for another means of livelihood and give up the unlawful employment.[2]

Ta'līfāt Rashīdīyyah:

It is permissible to work for non-Muslims provided it does not entail doing anything which is against the Sharīʿah.[3]

Ah̲san al-Fatāwā:

It is not permissible to be employed as a buyer, seller or server of alcohol. A person may be employed in some other department of the non-Muslim's business. However, here too there are many religious dangers. It is therefore better to abstain.[4]

Further reading: *Imdād al-Ah̲kām*, vol. 3, p. 533; *Fiqhī Maqālāt*, vol. 1, pp. 252-255.

Allāh taʿālā knows best.

The income of a football player

Question

What is the ruling with regard to the income of a football player? About half his thighs are exposed when he plays football.

Answer

When football players play a game, their thighs are exposed. It is impermissible to expose the thighs in this way. However, the player has the ability to cover them. His payment is for the actual game and not for exposing his thighs. His income is therefore not h̲arām. The player is classified as an ajīr khās̲ because he hands himself over for the game. He is therefore eligible for payment.

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[1] *Fiqhī Maqālāt*, vol. 1, pp. 250-252.

[2] *Fatāwā Mah̲mūdīyyah*, vol. 17, p. 121.

[3] *Ta'līfāt Rashīdīyyah*, p. 420.

[4] *Ah̲san al-Fatāwā*, vol. 7, p. 332.

حدثنا عبد الله بن مسلمة عن مالک عن أبی النضر عن زرعة بن عبد الرحمن بن جرہد عن أبیہ قال: کان جرہد ہذا من أصحاب الصفة أنہ قال: جلس رسول اللہ صلی اللہ علیہ وسلم عندنا وفخذي منکشفة فقال: أما علمت أن الفخذ عورة. (رواہ ابو داود: ۲/۵۵۷، باب النہی عن التعری، فیصل)

Jarhad who was from the people of Suffah said: Rasūlullāh sallallāhu ʿalayhi wa sallam came and sat with us while my thighs were exposed. He said: Don't you know that the thigh is an ʿaurah (something which has to be covered)?

وعن علي رضي الله عنه أن رسول اللہ صلی اللہ علیہ وسلم قال لہ: یا علي لا تبرز فخذک ولا تنظر إلی فخذ حي ولا میت. رواہ ابو داود، وابن ماجہ.

ʿAlī radiyallāhu ʿanhu narrates: Rasūlullāh sallallāhu ʿalayhi wa sallam said to me: "O ʿAlī! Do not expose your thigh nor look at the thigh of a living or dead person."

وعن محمد بن جحش رضي اللہ عنه قال: مر رسول اللہ صلی اللہ علیہ وسلم علی معمر وفخذاہ مکشوفتان قال: یا معمر غط فخذیک فإن الفخذین عورة، رواہ في شرح السنة. (مشکوٰۃ شریف: ۲/۲۶۹، باب النظر الی المخطوبة)

Rasūlullāh sallallāhu ʿalayhi wa sallam passed by Maʿmar and the latter's thighs were exposed. He said: "O Maʿmar! Cover your thighs because they are an ʿaurah (something which has to be covered)."

والأجیر الخاص الذي یستحق الأجرة بتسلیم نفسہ فی المدة وإن لم یعمل کمن استوجر شہراً للخدمة أو لرعی الغنم وإنما سمی أجیر وحد لأنہ لا یمکنہ أن

يعمل لغيره لأن منافعه فى المدة صارت مستحقة له والأجر مقابل بالمنافع ولهذا يبقى الأجر مستحقاً وإن نقص العمل. (الهداية: ٣/٣١٠، باب ضمان الاجير)

Allāh taʿālā knows best.

The income of a fashion model

Question

What is the ruling with regard to the income of a fashion model? When new fashionable garments are imported, beautiful women are hired to model those garments. Their naked bodies are used to display the garments. They are then published and advertised. The women are paid for this job. Is it permissible to accept this payment?

Answer

The income of a fashion model is impermissible because the exposure of her body parts are used as a livelihood. The ruling of the Sharīʿah is that a woman must be covered. It is haram for her to expose her body to non-mahrams. Such women must fear Allāh's wrath and repent from such an occupation.

> يَا أَيُّهَا النَّبِيُّ قُلْ لِأَزْوَاجِكَ وَبَنَاتِكَ وَنِسَاءِ الْمُؤْمِنِيْنَ يُدْنِيْنَ عَلَيْهِنَّ مِنْ جَلَابِيْبِهِنَّ.
>
> O Prophet! Say to your wives, your daughters and the women of the believers to draw over themselves some of their outer garments.[1]
>
> وَلَا يُبْدِيْنَ زِيْنَتَهُنَّ إِلَّا مَا ظَهَرَ مِنْهَا وَلْيَضْرِبْنَ بِخُمُرِهِنَّ عَلٰى جُيُوْبِهِنَّ.
>
> ...and not to display their adornment except that which is apparent thereof. And that they draw their head-coverings over their bosoms.[2]

[1] Sūrah al-Ahzāb, 33: 59.

[2] Sūrah an-Nūr, 24: 31.

وَقَرْنَ فِيْ بُيُوْتِكُنَّ.

Remain in your homes.[1]

قُلْ لِّلْمُؤْمِنِيْنَ يَغُضُّوْا مِنْ أَبْصَارِهِمْ وَيَحْفَظُوْا فُرُوْجَهُمْ.

Say to the believers to lower their gazes and to safeguard their private parts.[2]

وَقُلْ لِّلِمُؤْمِنٰتِ يَغْضُضْنَ مِنْ أَبْصَارِهِنَّ وَيَحْفَظْنَ فُرُوْجَهُنَّ.

Say to the believing women to lower their gazes and to safeguard their private parts.[3]

عن عبد الله رضي الله عن النبي صلى الله عليه وسلم قال: المرأة عورة فإذا خرجت استشرفها الشيطان. (رواه الترمذى: ١/٢٢٠، ابواب الرضاع)

عن رافع بن خديج رضي الله عنه عن رسول الله صلى الله عليه وسلم قال: ثمن الكلب خبيث ومهرالبغي خبيث وكسب الحجام خبيث. (رواه مسلم: ٢/١٩، باب تحريم ثمن الكلب)

<u>الفتاوى البزازية:</u>

وفى العيون لا تجب أجرة المغنية وفى المنتقى امرأة نائحة أو صاحبة طبل أو صاحبة مزامير اكتسبت مالاً إن كانت على شرط ردته على أربابها إن علموا وإن لم يعلموا تصدقت به وإن من غير شرط فهو لها قال الإمام الأستاذ: لا يطيب والمعروف كالمشروط. (الفتاوى البزازية بهامش الهندية: ٥/١٢٥، العاشر فى الحظر والاباحة)

Allāh ta'ālā knows best.

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[1] Sūrah al-Ahzāb, 33: 33.

[2] Sūrah an-Nūr, 24: 30.

[3] Sūrah an-Nūr, 24: 31.

The income of a broker

<u>Question</u>

A person wants to sell his car. Someone found him a buyer. Can this person [who found the buyer] take an amount for his efforts?

<u>Answer</u>

It is permissible for the one who searched for and found a buyer – i.e. a broker – to accept a specified wage for his efforts.

قال فى البزازية: إجارة السمسار والمنادي والحمامي والصكاك وما لا يقدر فيه الوقت ولا العمل تجوز لما كان للناس به حاجة ويطيب الأجر المأخوذ أو قدر أجر المثل. (فتاوى الشامى: ٦/٤٧، سعيد)

تتمة: قال فى التاتارخانية: وفى الدلال والسمسار يجب أجر المثل وما تواضعوا عليه أن في كل عشرة دنانير كذا فذلك حرام عليهم، وفى الحاوي: سئل محمد بن سلمة عن أجرة السمسار، فقال: أرجو أنه لا بأس به وإن كان فى الأصل فاسداً لكثره التعامل، وكثير من هذا غير جائز فجوزوه لحاجة الناس إليه كدخول الحمام. (فتاوى الشامى: ٦/٦٣، سعيد)

Further reading: *Imdād al-Ahkām*, vol. 3, pp. 555, 589; *Imdād al-Fatāwā*, vol. 3, p. 363; *Fatāwā Mahmūdīyyah*, vol. 16; *Ahsan al-Fatāwā*, vol. 7, p. 273.

Allāh taʿālā knows best.

Hiring an 'ajīr khās for a long period of time

<u>Question</u>

An employee was trained by someone in a company, he was taught the job, efforts were put into him, and expenses were incurred in his training. He was maintained as an employee and an agreement was made that if he leaves the company before five years, he will have to pay a fine or legal procedures will be effected against him. The employee now wants to leave the company after having worked for one year. Can an employee be compelled in this way?

Answer

This is how an employee can be kept for five years: The company says to him: We are hiring you for five years and this is the salary which you will receive for the five years. If you want, you can collect the full salary after five years or on a monthly basis. If the ijārah contract is concluded in this way, the employee cannot leave the employment without any genuine excuse. He will be compelled to remain with the one who hired him. If he leaves before the specified period, it will be permitted to take legal measures against him.

لا يجوز عقدها حتى يعلم البدل والمنفعة وبيان المنفعة بأحد ثلاث بيان الوقت وهو الأجل وبيان العمل والمكان. (الفتاوى البزازية على هامش الهندية: ٥/١١، كتاب الاجارات)

بدائع الصنائع:

وأما فى الأجير الخاص فلا يشترط بيان جنس المعمول فيه ونوعه وقدره وصفته وإنما يشترط بيان المدة فقط وبيان المدة في استئجار الظئر شرط جوازه بمنزلة استئجار العبد للخدمة لأن المعقود عليه هو الخدمة. (بدائع الصنائع: ٤/١٨٤، كتاب الاجارة، سعيد)

تبيين الحقائق:

والخاص يستحق الأجر بتسليم نفسه فى المدة وإن لم يعمل كمن استوجر شهراً للخدمة ...سمى أجيراً خاصاً وأجير وحد لأنه يختص به الواحد وهو المستاجر وليس له أن يعمل لغيره لأن منافعه فى المدة صارت مستحقة له والأجر مقابل بها فيستحقه ما لم يمنعه من العمل مانع. (تبيين الحقائق: ٥/١٣٧، ملتان)

الفتاوى الهندية:

وأما فى الأجير الخاص فلا يشترط بيان جنس المعمول فيه ونوعه وقدره وصفته وإنما يشترط بيان المدة فقط وبيان المدة في استئجار الظئر شرط الجواز بمنزلة استئجار العبد للخدمة (لأن المعقود عليه هو الخدمة). (الفتاوى الهندية: ٤/٤١١)

Allāh taʿālā knows best.

The income of a beautician

Question

Can a Muslim work as a beautician – where the person beautifies and embellishes the patrons? Similarly, can a Muslim accept payment for beautifying a bride?

Answer

It is permissible to work as a beautician provided the person remains within the limits of the Sharīʿah. Hadrat ʿĀ'ishah radiyallāhu ʿanhā narrates that when she was about to be sent over to Rasūlullāh sallallāhu ʿalayhi wa sallam, her mother handed her over to some women who beautified her appearance. After that, she was sent over to the house of Rasūlullāh sallallāhu ʿalayhi wa sallam.

عن عائشة رضي الله تعالىٰ عنها قالت: تزوجني النبي صلى الله عليه وسلم وأنا بنت ست سنين فقدمنا المدينة فنزلنا في بنى الحارث بن الخزرج ...فأتتني أمي أم رومان ...ثم أخذت شيئاً من ماء فمسحت به وجهي ورأسي ثم أدخلتنى الدار فإذا نسوة من الأنصار فى البيت فقلن على الخير والبركة وعلى خير طائر فأسلمتني إليهن فأصلحن من شأني فلم يرعني إلا رسول الله صلى الله عليه وسلم ضحى فأسلمنني إليه وأنا يومئذٍ بنت تسع سنين. (رواه البخارى: ١/٥٥١، باب تزويج النبى صلى الله عليه وسلم عائشة وقدومه المدينة وبنائه بها)

شرح منظومة ابن وہبان:

تكميل: بذكر إجارة الماشطة لتزيين العروس: قال فى البزازية: استاجر ماشطة لتزيين العروس لا يحل لها الأجر لعدم صحة الإجارة إلا على وجه الهدية، والصواب أنه إن ذكر العمل والمدة يجوز، وألحقت ذلك في بيت فقلت:

وما حل أجر للمواشط أو نعم - إذا عمل والوقت يذكر حرروا

(شرح منظومة ابن وہبان: ٢/٧٨، فصل من كتاب الاجارة)

فتاوىٰ قاضيخان:

ولو استاجر مشاطة لتزيين العروس قالوا: لا يطيب لها الأجر إلا أن يكون على وجه الهدية بغير شرط ولا تقاض، قال مولانا رحمه الله تعالىٰ: وينبغي أن الإجارة إذا كانت مؤقتة وكان العمل معلوماً ولم تنقش التمثال والصور جازت الإجارة ويطيب لها الأجر لأن تزيين العروس مباح. (فتاوىٰ قاضيخان بهامش الفتاوى الهندية: ٢/٣٢٤، باب الاجارة الفاسدة)

الفقه على المذاہب الاربعة:

و تصح إجارة الماشطة لتزيين العروس بشرط أن يذكر العمل أو مدته فى العقد. (الفقه على المذا ہب الاربعة: ٣/٩٨، مبحث ما تجوز اجارته وما لا تجوز)

وفى الدر المختار: وجاز إجارة الماشطة لتزيين العروس إن ذكر العمل والمدة، بزازية. وفى الشامية: قوله والمدة، عبر فى الذخيرة وغيرها بأو فالواو هنا بمعناها. (الدر المختار مع رد المحتار: ٦/٦٣، باب الاجارة الفاسدة، سعيد)

Allāh ta'ālā knows best.

An agent having to return the money

<u>Question</u>

A person in Malawi – let's call him Zayd – gave 500 000 rupees to ʿUmar to organize his papers. ʿUmar gave this money to an officer. The latter took the money but did nothing. Is it obligatory on ʿUmar to return the money to Zayd?

<u>Answer</u>

If Zayd gave the money to ʿUmar so that he may get the job done, and accepted the responsibility of the job – as is the norm – then in the case where the job is not done, it will be ʿUmar's responsibility to return the money.

For example, you hire a person to bake bread, and the bread gets burnt before it can be taken out from the oven. The hired person will be liable to pay for the loss.

ولو احترق (أى الخبز) قبله (قبل إخراجه) لا أجر له ويغرم اتفاقاً لتقصيره، درر وبحر. وفى الشامية: قوله لتقصيره أى بعدم القلع من التنور. (الدر المختار مع رد المحتار: ٦/١٦، سعيد)

Similarly, if a person hires a person to cook food for him, and he burns the food or does not cook it as it ought to have been cooked, he will be liable to pay.

قال فى الدر المختار: فإن أفسد أى الطعام الطباخ أو أحرقه أو لم ينضجه فهو ضامن للطعام. (الدر المختار: ٦/١٧، سعيد)

A person hires a woman as a wet-nurse but the latter feeds goat's milk to the infant. She will not be eligible for payment.

وقال فى الهداية: وإن أرضعته فى المدة بلبن شاة فلا أجر لها، لأنها لم تأت بعمل مستحق عليها، وهو الإرضاع فإن هذا إيجار وليس بإرضاع. (الهداية: ٣/٣٠٥)

However, if ʿUmar said that he is not responsible for the job and is merely conveying the money to the officer as a courier, then ʿUmar is not responsible to pay back the money.

قال فى البدائع: ومنها أى من حقوق التوكيل وأحكامها، أن المقبوض في يد الوكيل بجهة التوكيل بالبيع والشراء وقبض الدين والعين وقضاء الدين أمانة بمنزلة الوديعة. (بدائع الصنائع: ٦/٣٤، كتاب الوكالة، سعيد)

If nothing was stated clearly, then societal norms will be taken into consideration. Under societal norms, a large amount as this is given as a responsibility, so ʿUmar will be held responsible. Yes, if ʿUmar is certainly constrained, then Zayd can treat him with some consideration.

Allāh taʿālā knows best.

The condition of giving three month's advance notice

Question

A landlord gave a shop to Zayd at a monthly rental of R2 000.00. It was stated in the rental contract that the tenant will have to inform the landlord three months before his intention to vacate the premises. Furthermore, he will have to pay a rent for three additional months. Is it permissible to lay down such a condition?

Answer

This agreement is like a monetary fine. Those ʿulamā' who permit monetary fines say that this condition is permissible. Those who do not consider monetary fines to be permissible say that this condition is impermissible. Details with regard to monetary fines can be found in volume four of *Fatāwā Dār al-ʿUlūm Zakarīyyā.*

Similarly, if a condition is made with an employee to inform the employer three months before his intention to leave the job – in other words, he will give three months salary to the employer – then the same answer will be given.

In the same way, if the government lays down the law that an employer has to give three month's notice to his employee, and cannot retrench him without this notice, if not, the employee can make a claim through the government and then collect three month's additional pay; then the same answer will apply.

Allāh taʿālā knows best.

Expenses for a rented piece of land

Question

Zayd rented a piece of land from ʿUmar. The annual rental is five hundred rupees per thirty square feet. Who is liable to pay for the expenses of the land; the landlord or the tenant?

Answer

Whatever the two agree on in the contract will be valid and correct. It will be permissible to charge either of the two. If no mention is made of who is going to pay, then societal norms and common practice will be taken into consideration. And this will be permissible. Yes, where there is a farming agreement, the landlord will pay.

Allāh taʿālā knows best.

Hiring a person for the forceful removal of a tenant

Question

Zayd owns a house which has been rented by ʿUmar for quite some time and for which he is paying rent. The lease has ended and Zayd wants ʿUmar to vacate the property because he needs it for himself. ʿUmar is refusing to vacate it. Can Zayd hire someone to remove ʿUmar by force?

Answer

Once the lease period has expired, it is wrong for ʿUmar to insist on living there. It is therefore permissible for Zayd to hire someone remove him forcefully. It is permissible to hire a person for a specific lawful and known task.

Allāh taʿālā knows best.

Taking a deposit from a tenant

Question

Is it permissible to demand a deposit? For example, a person wants to rent a house. The owner says: "Pay me R50 000.00 as a deposit, and I will give you the house on rent." What should he do? Is this deposit a debt or a mortgage? Then there are two possibilities, the rent is decreased because of the deposit, or it is not. For example, if the rent was R3 000.00, it is reduced to R2 000.00 because of the deposit.

Answer

If the owner is not permitted to use the deposit amount, it is a mortgage. The benefit of this is that if the tenant damages the house in any way or does not pay the rent, it will be deducted from the mortgage amount. If the owner is permitted to use the deposit, it is a debt. However, decreasing the rent on account of the deposit will be classified as usury, and therefore impermissible.

ʿAllāmah Haskafī rahimahullāh defines a mortgage as follows:

هو حبس شيء مالى أى جعل الشيء محبوساً لأن الحابس هو المرتهن بحق يمكن استيفاؤه أى أخذه منه. (الدر المختار، كتاب الرهن، كوئته)

درر الحكام:

هو حبس المال بحق يمكن أخذه أى الحق منه أى من المال.

Jadīd Fiqhī Masā'il:

The issue of an amount which is paid as a deposit and a guarantee needs to be examined. It appears that it is like a mortgage.

The author then presents his view: I feel there is nothing wrong in collecting an amount like this as a guarantee. The amount is classified as a debt.

Further reading: *Īdāh an-Nawādir*, vol. 2, p. 20; *Jadīd Fiqhī Mabāhith*, vol. 7, p. 733; *Āp Ke Masā'īl Aur Oen Kā Hull*, vol. 6, p. 140; *Mahmūd al-Fatāwā*, vol. 3, p. 90.

In the case where it is a debt, it is impermissible to reduce the rental amount.

وقال عليه الصلاة والسلام: كل قرض جر منفعة فهو ربا. إسناده ضعيف مرفوعا لا موقوفا. (اتحاف الخيرة المهرة: ج ٣، ص ٣٩٠. ورواه الحاكم والبيهقي في سننه الكبرى)

A loan which attracts a benefit is usury.

Allāh taʿālā knows best.

Being a broker in a stock exchange

Question

Is it permissible to work as a broker in a stock exchange?

Answer

A stock exchange revolves around transactions which are carried out by a broker. A broker who brokers the sale and purchase of shares between those who are selling the shares and those who are purchasing them maintains a contact between the two in five ways:

1. A general and simple way of brokering sale and purchase. A broker – based on his contacts and knowledge – purchases shares from shareholders and gives them over to a buyer either immediately or on a specified date in the future. He collects an agreed-upon commission for his brokerage.

2. Sometimes, a buyer does not have the money, so the broker buys the shares on his behalf either by paying the full or partial amount for the shares. He then hands over the shares to him. The buyer is given a few days' respite for repayment without interest, and charges him interest after that. This is referred to as a "sale on margin".

3. In his efforts to obtain a commission, the broker sells shares which he does not own on the premise that he will buy them later on. This is known as a short sale.

4. The agreement between the buyer and broker is with respect to the sale and purchase in the future. This is known as a forward sale.

5. The brokers effect a future sale. This was explained previously.

From all the above, only the first one is permissible. The remaining four are classified as invalid transactions. They are unlawful because they contain the elements of speculation or usury.

Therefore, if a person is working in a stock exchange and can avoid these transactions which are impermissible, it will be permissible for him to work there. If it is not possible, he must not work as a broker. He must protect himself against falling into ḫarām.

A person who is an intermediary for the sale and purchase of shares on the stock exchange is known as a broker. He has knowledge of the value, sale and purchase of shares. He undertakes the procedures for the sale and purchase of shares. He is therefore like an agent and ajīr mushtarak (co-partnered hireling). To put it in another way, a broker is a dallāl – agent. If such a person works as a broker for companies

which are engaged in halāl trade, it will be permissible for him to work as a broker. His income will be lawful according to the Sharīʿah.

Further reading: *Islām Aur Jadīd Maʿīshat Wa Tijārat*, pp. 110-112; *Jadīd Fiqhī Mabāhith*; *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 1, p. 108; *Fatāwā ʿUthmānī*, vol. 3, pp. 185-189.

Allāh taʿālā knows best.

Taking payment for the Sharī'ah sciences

Question

There is a group in Pakistan which holds the belief that it is harām to take payment for teaching the Qur'ān, Hadīth and other Sharīʿah sciences. This group presents the following Qur'ānic verse and Hadīth to justify its belief:

وَلَا تَشْتَرُوْا بِاٰيٰتِيْ ثَمَنًا قَلِيْلًا.

> Do not purchase My verses for a small price.[1]
>
> وعن عبادة بن الصامت رضي الله عنه قال: علمت ناساً من أهل الصفة الكتابة والقرآن فأهدى إليّ رجل منهم قوساً فقلت: ليس بمال وأرمي بها في سبيل الله فسألت رسول الله صلى الله عليه وسلم عنها فقال: إن سرك أن تطوق بها طوقاً من نار فاقبلها.
>
> ʿUbādah ibn Sāmit radiyallāhu ʿanhu narrates: I taught writing and the Qur'ān to some of the people of Suffah. One of them presented me with a bow as a gift. I thought to myself: It is not wealth. Anyway, I will use it [for jihād] in Allāh's cause. I then asked Rasūlullāh sallallāhu ʿalayhi wa sallam about it, so he said: "If it pleases you to be necklaced by a necklace of fire in exchange for it, you may accept the gift."

They also present other proofs, but their strong proofs are the above-quoted ones. Kindly present the Sharīʿah ruling on the acceptance of

[1] Sūrah al-Mā'idah, 5: 44.

payment for teaching the Sharīʿah sciences and give a reply to the above proofs. Also, explain the status of the above-quoted Hadīth.

Answer

The fundamental verdict of the three imāms of the Hanafī madh-hab is that it is impermissible to accept payment for acts of obedience. This is the preferred view of most of the jurists. However, the latter day jurists issued the verdict of permissibility on the basis of need and the fact that teachers are no longer given stipends from the Bayt al-Māl (the Islamic treasury). Therefore, the verdict in our times is that it is permissible to accept payment for teaching and other related services.

Furthermore, the latter day jurists said that the verdict of impermissibility of Imām Abū Hanīfah, Imām Muhammad and Imām Abū Yūsuf rahimahumullāh is based on piety or to shut off the door to making the Qur'ān a means for livelihood.

There are many proofs which permit the acceptance of payment for the Sharīʿah sciences. A few are presented here:

(١) قال الله تعالىٰ: فإن أرضعن لكم فآتوهن أجورهن. (سورة الطلاق:٦)

والإرضاع من الطاعات، ومع هذا أمر الله تعالىٰ بأداء أجرته إلى المرضع.

(٢) روى ابن أبي شيبة فى المصنف (١١/٢٧/٢١٢٢٨)، والبيهقي فى السنن الكبرى (٦/١٢٤) عن الوضين بن عطاء، قال: كان بالمدينة ثلاثة معلمين يعلمون الصبيان، فكان عمر بن الخطاب رضي الله عنه يرزق كل واحد منهم خمسة عشر كل شهر.

(٣) روى ابن سلام (١٧٣)، والمنذري فى الأوسط (٦٥٣٤)، والبيهقي فى السنن الكبرى (٩/١٣٦) بإسناد صحيح: أن عمر بن الخطاب رضي الله عنه بعث عمار بن ياسر رضي الله عنه إلى أهل الكوفة على صلاتهم وجيوشهم، وعبد الله بن مسعود رضي الله عنه على قضائهم وبيت مالهم وعثمان بن حنيف رضي الله عنه على مساحة الأرض، ثم فرض لهم في كل يوم شاة بينهم، قال: أو قال:

جعل لهم في كل يوم شاة: شطرها وسواقطها لعمار رضي الله عنه، والشطر الآخر بين هذين.

(٤) وروى ابن سلام (٦٤٥) أن عمر بن عبد العزيز بعث يزيد بن أبي مالك الدمشقي، والحارث بن يمجد الأشعري، يفقهان الناس فى البدو، وأجرى عليهما رزقاً، فأما يزيد فقبل، وأما الحارث فأبى أن يقبل، فكتب إلى عمر بن عبد العزيز بذلك، فكتب عمر: إنا لا نعلم بما صنع يزيد بأساً، وأكثر الله علينا مثل الحارث بن يمجد.

(٥) روى أحمد (٢٢١٦)، والحاكم (٢/١٤١)، والبيهقي فى السنن الكبرى (٦/١٢٤) عن ابن عباس رضي الله عنه قال: كان ناس من الأسرى يوم بدر لم يكن لهم فداء، فجعل رسول الله صلى الله عليه وسلم فداءهم أن يعلموا أولاد الأنصار الكتابة.

(٦) روى البخاري (٥٧٣٦) عن أبي سعيد الخدري رضي الله عنه أن ناساً من أصحاب النبى صلى الله عليه وسلم أتوا على حي من أحياء العرب فلم يقروهم، فبينماهم كذلك إذ لدغ سيد أولئك، فقالوا: هل معكم من دواء أو راقٍ؟ فقالوا: إنكم لم تقرونا ولا نفعل حتى تجعلوا لنا جعلاً، فجعلوا لهم قطيعاً من الشاء، فجعل يقرأ بأم القرآن ويجمع بزاقه ويتفل، فبرأ، فأتوا بالشاء، فقالوا: لا نأخذه حتى نسأل النبي صلى الله عليه وسلم، فسألوه، فضحك وقال: وما أدراك أنها رقية، خذوها واضربوا لي بسهم.

لكن هذا الحديث فى الرقية دون التعليم، والرقية من قبيل العلاج يجوز أخذ الأجرة بها.

(٧) وفي رواية أخرى عن ابن عباس رضي الله عنه:...قالوا: يا رسول الله آخذ على كتاب الله أجراً فقال رسول الله صلى الله عليه وسلم: إن أحق ما أخذتم عليه أجراً كتاب الله . (صحيح البخارى: ٥٧٣٧)

(٨) روى ابن عدى فى الكامل (٥/١٥٢) عن عائشة رضى الله تعالىٰ عنها سألت رسول الله صلى الله عليه وسلم عن كسب المعلمين، فقال: إن أحق ما أخذ عليه الأجر لكتاب الله تعالىٰ. وقال: ہو حديث منكر.

(٩) روى أحمد (٢١٨٣٦)، وأبو داود (٣٩٠٣)، والنسائي فى الكبرى (١٠٨٠٤)، والبيہقي فى الشعب (٢١٥٠)، وغيرہم عن خارجة بن الصلت عن عمہ أنہ مر بقوم فأتوه فقالوا: إنک جئت من عند ہذا الرجل بخير، فأرق لنا ہذا الرجل، فأتوه برجل معتوه فى القيود فرقاہم بأم القرآن ثلاثة أيام غدوة وعشية كلما ختمہا جمع بزاقہ ثم تفل، فكأنما أنشط من عقال، فأعطوه شيئاً، فأتى النبي صلى الله عليہ وسلم فذكره لہ، فقال النبي صلى الله عليہ وسلم: كل لعمرى من أكل برقية باطل، لقد أكلت برقية حق.

(١٠) في صحيح البخاري: باب رزق الحكام والعاملين عليها، وكان شريح القاضي يأخذ على القضاء أجراً. وقالت عائشة رضي الله تعالىٰ عنها: يأكل الوصي بقدر عمالتہ. وأكل أبو بكر رضي الله عنه وعمر رضي الله عنه.

(١١) روى عبد الرزاق فى المصنف (١٥٢٨٢) عن الحكم: أن عمر بن الخطاب رضي الله عنه رزق شريحاً وسلمان بن ربيعة الباہلي على القضاء.

(١٢) روى ابن أبي شيبة فى المصنف (٢٢٢٢٨)، وابن المنذر فى الأوسط (٦٥٣٣) عن نافع قال: كان يزيد بن ثابت يأخذ على القضاء أجراً.

(١٣) روى ابن أبي شيبة فى المصنف (٢٢٢٣٣) عن ابن أبي ليلىٰ قال: بلغنى أن علياً رضي الله عنه رزق شريحاً خمس مئة.

(١٤) روى ابن سعد فى الطبقات الكبرى (٣/١٨٤) بإسناد صحيح عن ميمون الجزري قال: لما استخلف أبو بكر رضي الله عنه جعلوا له ألفين، فقال: زيدوني فإن لي عيالاً وقد شغلتموني عن التجار، قال: فزادوه خمس مئة، قال: إما أن تكون ألفين فزادوه خمس مئة، أو كانت ألفين وخمس مئة فزادوه خمس مئة.

والتعليم يشبه بالخلافة والقضاء من حيث كونه عبادة نفعها متعدٍ.

(١٥) روى مسلم (٢٤٠٥) عن عمر بن الخطاب رضى الله تعالىٰ عنه قال: إني عملت على عهد رسول الله صلى الله عليه وسلم فعملني، وفى الحديث قصة.

والتعليم كعمل العامل في كونهما عبادة نافعة للغير.

(١٦) روى أبو داود (٢٨٧٤) عن عمرو بن شعيب عن أبيه عن جده أن رجلاً أتى النبي صلى الله عليه وسلم فقال: إني فقير ليس لي شيء ولي يتيم، قال: فقال: كل من مال يتيمك غير مسرف ولا مبادر ولا متأثل.

وخدمة اليتيم كالتعليم في تعدى النفع وعدم وجوبها على العين.

وفي أكل الوصي من مال اليتيم بالمعروف أحاديث وآثار ذكرها المفسرون في تفسير الآية: "من كان فقيراً فليأكل بالمعروف." (سورة النساء: ٦)

(١٧) روى أبو داود (٢٩٤٧) عن المستورد بن شداد قال: سمعت النبي صلى الله عليه وسلم يقول: من كان لنا عاملاً فليكتسب زوجة، فإن لم يكن خادم فليكتسب خادماً، فإن لم يكن له مسكن فليكتسب مسكناً.

أى يجوز للوالي أن يأخذ من بيت المال قدر كفايته من النفقة والكسوة لنفسه، ولمن يلزمه نفقته، ويتخذ لنفسه منه مسكناً وخادماً.

(١٨) روى الخطيب فى التاريخ (٢/٨١) بإسناده عن الحسن البصري أن عمر بن الخطاب رضي الله عنه وعثمان بن عفان رضي الله عنه كانا يرزقان المؤذنين والأئمة والمعلمين والقضاة.

(١٩) روى البيهقي في معرفة السنن والآثار (٥/٣٨٢/٤٣٠٣) بإسناده عن إبراهيم بن سعد عن أبيه: أن عمر رضي الله تعالىٰ عنه كتب إلى بعض عماله: أن أعط الناس على تعليم القرآن، فكتب إليه إنك كتبت إليّ أن أعط الناس على تعليم القرآن فتعلمه من ليس فيه رغبة إلا فى الجعل، فكتب إليه أن أعطهم على المروءة والصحابة.

وللاستزادة انظر: (تكملة عمدة الرعاية حاشية شرح الوقاية: ٣/٣٠١، رقم الحاشية: ٦)

An appraisal of the proofs of impermissibility

1.

وَلَا تَشْتَرُوْا بِاٰيٰتِيْ ثَمَنًا قَلِيْلًا.

Do not purchase My verses for a small price.[1]

This verse means:

لا تأخذوا على تحريف آياتي مالا من الناس.

Do not seek wealth from people by distorting the verses.

This verse does not mention the prohibition of accepting payment for teaching the verses. Other verses prove this point:

فَوَيْلٌ لِّلَّذِيْنَ يَكْتُبُوْنَ الْكِتٰبَ بِأَيْدِيْهِمْ ۗ ثُمَّ يَقُوْلُوْنَ هٰذَا مِنْ عِنْدِ اللهِ لِيَشْتَرُوْا بِهٖ ثَمَنًا قَلِيْلًا.

[1] Sūrah al-Mā'idah, 5: 44.

> Woe, then, to those who write the Book with their hands and say thereafter: "This is from Allah", in order to acquire thereby a small profit.[1]

2.

> إِنَّ كَثِيْرًا مِّنَ الْأَحْبَارِ وَالرُّهْبَانِ لَيَأْكُلُوْنَ أَمْوَالَ النَّاسِ بِالْبَاطِلِ وَيَصُدُّوْنَ عَنْ سَبِيْلِ اللّٰهِ.

> Many of the scholars and dervishes of the people of the Book devour the wealth of the people wrongfully and they hinder [others] from the path of Allāh.[2]

Answer: This verse speaks out against the acceptance of usury and not the acceptance of payment for teaching. The Qur'ān speaks out against this action of theirs in several places in the Qur'ān. There are well-known.

3. An investigation of the Hadīth:

علمت ناساً من أهل الصفة الكتابة والقرآن فأهدى إليّ رجل منهم قوساً.

This Hadīth has been narrated by three Sahābah: (1) 'Ubādah ibn Sāmit radiyallāhu 'anhu. (2) Abū Dardā' radiyallāhu 'anhu. (3) Ubayy ibn Ka'b radiyallāhu 'anhu.

أماحديث عبادة بن الصامت رضي الله عنه: فأخرجه أحمد (٢٢٦٨٩)، وابن أبي شيبة (٢١٢٣٧)، وأبو داود (٣٤١٦)، وابن ماجه (٢١٥٧)، والبيهقي فى السنن الكبرى (٦/١٢٥)، والحاكم (٢/٤١) من طريق مغيرة بن زياد الموصلي، عن عبادة بن نسي، عن الأسود بن ثعلبة ، عن عبادة بن الصامت رضي الله عنه قال: علمت ناساً من أهل الصفة القرآن والكتابة، فأهدى إلي رجل منهم قوساً، فقلت: ليست بمال، وأرمي عنها في سبيل الله، فسألت رسول الله صلى الله عليه وسلم عنها، فقال:إن سرك أن تطوق بها طوقاً من نار فاقبلها.

[1] Sūrah al-Baqarah, 2: 79.

[2] Sūrah at-Taubah, 9: 34.

قال الحاكم:صحيح الإسناد لكن تعقبه الذهبي بقوله: مغيرة صالح الحديث وقد تركه ابن حبان.

قلت: إسناده ضعيف، الأسود بن ثعلبة مجهول، مغيرة بن زياد فيه كلام، وقد خالفه بشر بن عبد الله السلمي. وهو حسن الحديث. فرواه عن عبادة بن نسى، عن جنادة بن أبي أمية، عن عبادة بن الصامت رضي الله عنه.

أخرجه أحمد (٢٢٧٦٦)، وأبو داود (٣٤١٧)، والحاكم (٣/٣٥٦)، وقال: صحيح الإسناد، ووافقه الذهبي، وصححه أيضاً أحمد شاكر في تعليقاته على مسند الإمام أحمد. (٢٢٦٦٥)

قلت: إسناده حسن، فإن رجاله كلهم ثقات معروفون غير بشر هذا، وقد روى عنه جماعة ووثقه ابن حبان، وابن عساكر كما في تعليقات الشيخ أحمد شاكر على مسند الإمام أحمد. وقال الحافظ فيه: صدوق.

وأما حديث أبي الدرداء: فأخرجه البيهقي فى السنن الكبرى (٦/١٢٦) من طريق عثمان بن سعيد الدارمي، عن عبد الرحمن بن يحي بن إسماعيل بن عبيد الله: حدثنا الوليد بن مسلم حدثنا سعيد بن عبد العزيز، عن إسماعيل بن عبيد الله، عن أم الدرداء، عن أبي الدرداء أن رسول الله صلى الله عليه وسلم قال: من أخذ قوساً على تعليم القرآن قلده الله قوساً من نار.

قال التركماني: إسناده جيد.

وقال الحافظ فى التخليص الحبير (٤/١٤): رواه الدارمي ــ يعني عثمان بن سعيد الدارمي، لا الدارمى المشهور صاحب السنن ــ بسند على شرط مسلم من حديث أبي الدرداء، لكن شيخه عبد الرحمن بن يحي بن إسماعيل لم يخرج له مسلم، وقال فيه أبو حاتم: ما به باس.

وأما حديث أبي بن كعب رضي الله عنه: فأخرجه ابن ماجه (١٢٥٨)، والبيهقي فى السنن الكبرى (٦/١٢٥ـ ١٢٦) من طريق ثور بن يزيد: حدثنا خالد ابن معدان ــ وأسقط البيهقي منه خالد بن معدان ــ حدثني عبد الرحمن، عن عطية الكلاعي، عن أبي بن كعب رضي الله عنه قال: علمت رجلاً القرآن فأهدى إليّ قوساً فذكرت ذلك لرسول الله صلى الله عليه وسلم فقال: إن أخذتها أخذت قوساً من نار. فرددتها.

قلت: إسناده ضعيف، وفيه ثلاث علل:

الأولى: الانقطاع بين عطية وأبي بن كعب رضي الله عنه: قال العلاء فى المراسيل: عطية بن قيس عن أبي بن كعب رضي الله عنه مرسل. ذكره البوصيري فى الزوائد (٣/١٧). وقال البيهقي فى السنن الكبرى (٦/١٢٥): منقطع.

الثانية: جهالة عبد الرحمن بن سلم، قال الحافظ فى التقريب: مجهول.

الثالثة: الاضطراب، قال الذهبي فى الميزان (٢/٥٦٧) في حديثه هذا: إسناده مضطرب. وقال المزي في تهذيب الكمال (١٧/١٤٨): في إسناد حديثه اختلاف كثير. وأقره الحافظ فى التهذيب (٦/١٧٠).

ولحديث أبي رضي الله عنه طرق أخرى ذكرها الشيخ شعيب الأرنؤوط في تعليقاته على سنن ابن ماجه (٣/٢٨٧ـ٢٨٨) فراجعها إن شئت.

والجواب عن حديث عبادة بن الصامت رضي الله عنه:

(أ) هذا الحديث منسوخ بقول النبي صلى الله عليه وسلم: إن أحق ما أخذتم عليه أجراً كتاب الله. (صحيح البخارى: ٥٧٣٧)

وللاستزادة انظر: (معرفة السنن والآثار للامام البيهقى: ٥/٣٨١-٣٨٢، دار الكتب العلمية بيروت)

وہذا وارد في مثل الرقية وكذلك التعليم، دون القراءة لإيصال الثواب.

والأحسن أن يقال: إن الناسخ ہو: تہادوا تحابوا. (أبو يعلى: ٦١٤٨، بإسناد حسن) وكان النبي صلى الله عليہ وسلم يقبل الهدية ويثيب عليہا. (صحيح البخارى: ٢٥٨٥)

وأخرج ابن حبان في صحيحہ (١٦٨٠/٥٧٤/٤) عن أبي محذورة... أنہ قال: فلما فرغ من التأذين دعاني وفأعطاني صرة فيہا شيء من فضة... الخ.

قال الشيخ شعيب الأرنؤوط: إسناده صحيح على شرطہما.

(ب) إذا لم تبلغ الرواية درجة الصحة وكانت مخالفة لأصول الدين فلا يعمل بہا، وہذه الرواية كذلک، فإن المذكور فيہا أن أحداً من أصحاب الصفة أہدى إلى عبادة بن الصامت رضي الله عنه شيئاً، وليس فيہ أنہ دفع الأجرة. والأصل أن الهدية لا بأس بہ بالاتفاق، لكن ہذا الحديث ينہى عن ذلک أشد النہي.

(ج) لعل منعہ صلى الله عليہ وسلم عبادة بن الصامت رضي الله عنه عن قبول الهدية كان لأجل فقر المہدي وكونہ مضطراً، فنبہ النبي صلى الله عليہ وسلم على أنہ ينبغي أن يہدى إليہ، لا أن يؤخذ منہ شيء.

(د) ليس فى الرواية ذكر الأجرة قطعاً فلا يصح الاستدلال بہا على عدم جواز أخذ الأجرة على الطاعات.

وللاستزادة انظر: (نصب الراية لأحاديث الهداية للامام جمال الدين الزيلعي: ١٣٦/٤-١٣٨، باب الاجارة الفاسدة، بيروت)

(٤) عن عثمان بن أبى العاص رضي الله عنه قال:إن من آخر ما عہد إليّ رسول الله صلى الله عليہ وسلم أن اتخذ مؤذناً لا يأخذ على أذانہ أجراً. (أخرجہ أصحاب السنن الأربعة وحسنہ الترمذى، وأخرجہ الحاكم وصححہ،

والبيهقي فى السنن الكبرى (١/٤٢٩) وأحمد في مسنده (١٦٢٧٠) والخزيمة فى صحيحه (٤٢٣).

تمسک بہ من منع الاستئجار على الأذان ولا دليل فيہ لجواز أنہ صلى الله عليہ وسلم أمره بذلک أخذاً للأفضل كذا قالہ الطيبى.-(التعليق الصبيح: ١/٢٩٩، لمولانا ادريس الكاندهلوى)

وقال الشيخ الغورغشتوي في تعليقاتہ على مشكاة المصابيح (٦٩): ہذا محمول على الاستحباب.

وقال الإمام الترمذي: استحبوا للمؤذن أن يحتسب في أذانہ. (جامع الترمذى: ١/٥١)

(٥) ذكر ابن الجوزي: من رواية ابن عباس رضي الله عنه مرفوعاً: "لا تستأجروا المعلمين" وفي إسناده أحمد بن عبد الله الہروي، قال: وہو دجال يضع الحديث، وہذا من صنعہ، ووافقہ صاحب "التنقيح" على ذلک، والله أعلم. (نصب الراية لاحاديث الهداية: ٤/١٣٨، باب الاجارة الفاسدة)

Allāh taʿālā knows best.

Hiring out an item which is co-owned

Question

Two persons bought a taxi and one person disappeared. The one who is present paid the full amount for the taxi. The one who disappeared came back after three months and paid half the amount. Is the one who disappeared a partner in the income of the three months? If the one who was present drove the taxi, can he ask for three months' salary from the share of the partner?

Answer

The buyer who was present paid the amount on behalf of the one who was absent on the basis of being his representative. By so doing, the two have become partners in the purchased item. Since they have become partners in the item, they will be partners in its profits. The

absent one will therefore be a partner in the three months' income. However, since the partner is absent and he does not have a representative, he cannot collect the salary of his share. In a hiring/rental contract, it is essential for both parties to be in agreement and for the contract to be present. It is absent in this case. Yes, the partner ought to give the driver something for his efforts.

ولو غاب أحد المشتريين فللحاضر دفع كل الثمن وقبضه وحبسه حتى ينقد شريكه... فصار كمعير الرهن وصاحب العلو والوكيل بالشراء إذا أدى الثمن من ماله. (البحر الرائق: ٦/١٧٥، كوئته)

وكل واحد منهما قائم مقام صاحبه فى التصرف فكان شراء أحدهما كشرائهما. (البحر الرائق: ٥/١٧٠، كوئته)

قال فى الهداية: الإجارة عقد يرد على المنافع بعوض. (الهداية: ٣/٢٩٣، كتاب الاجارات)

وفى الفتاوى الهندية: أما تفسيرها شرعاً فهى عقد على المنافع بعوض. (الفتاوى الهندية: ٤/٤٠٩)

Ahsan al-Fatāwā has the following answer to a detailed question:

Zayd had not made an agreement with his father to work for him for a payment. His work is therefore classified as a tabarruʿ - a donation...However, bearing in mind the efforts put in by Zayd, his father should assist him appropriately.[1]

Allāh taʿālā knows best.

Demanding rental when there was no rental agreement

Question

Zayd was ʿUmar's neighbour and the two were quite friendly to each other. Zayd used ʿUmar's land for a long period of time. The latter did not object to it nor did they have any rental agreement. When ʿUmar passed away, Zayd continued using the land and no one raised any objections to it nor did anyone demand anything. Now some of

[1] *Ahsan al-Fatāwā*, vol. 6, p. 319.

ʿUmar’s heirs are saying that the land was used without permission. Therefore, rental for the past years will have to be paid. Is it obligatory on Zayd to pay rent for the past years?

Answer

Zayd used ʿUmar’s land as an ʿāriyah (loaned or borrowed item). This was a permission based on common practice. The present demand for rental and claim of some of the heirs that the land was used without permission is a claim without proof. No consideration is given to this baseless claim.

Furthermore, there was no rental agreement. The demand for rental is therefore impermissible. The payment of a rental is the result of a rental agreement; and here there was no rental agreement/contract in the first place.

المادة: لا يجوز لأحد أن يتصرف فى مال الغير إلا باذنه... ثم الإذن قديكون صريحاً... وقد يكون دلالةً... (شرح المجلة لمحمد خالد الاتاسى: ١/٢٦٢، رشيديه)

وفى المحيط البرہانى: فى عارية الواقعات: رجل أراد أن يستمد عن محبرة غيره فهذا على ثلاثة أوجه: الأول: أن يستاذنه وفى ہذا الوجه له أن يفعل ذلک إلا أن ينهاه. والثانى: أن يعلمه وفى ہذا الوجه له ذلک أيضاً اذا لم ينهه لأنه إذا لم ينهه فهو إذن له دلالة. والثالث: إذا لم يستاذنه ولم يعلمه وإنه على وجهين: إن كان بينهما انبساط فله أن يفعل ذلک لمكان الإذن عرفاً، وإن لم يكن بينهما انبساط ليس له أن يفعل لأنه فى الأذن عرفاً تودد. (المحيط البرہانى: ٦/١٦٣، رشيدية)

أما تفسيرہا شرعاً فهو عقد على المنافع بعوض كذا فى الهداية. (الفتاوى الهندية: ٤/٤٠٩)

وفی الفقہ الحنفی فی ثوبہ الجدید: الإجارة فی الشرع عبارة عن العقد علی المنافع بعوض ہو مال، فتملیک المنافع بعوض إجارة، وبغیر عوض إعارة. (الفقہ الحنفی فی ثوبہ الجدید: ٤/٣٣٩، دار القلم، دمش)

Allāh ta'ālā knows best.

Asking for payment for being a surety

Question

Zayd ordered goods from Hasan and made a bank the guarantor. Can the bank ask for payment for this guarantee?

Answer

The Sharī'ah considers a surety contract to be an act of kindness and an initial donation. It is not permissible to take a payment for it. Yes, there is leeway to take a payment for the writing and recording of the documents. In the above case, the bank cannot ask for a payment. However, it is permissible to charge for the paperwork.

والکفالة عقد تبرع کالنذر لا یقصد بہ سوی ثواب اللہ أو رفع الضیق عن الحبیب فلا یبالی بما التزم فی ذلک... فکان مبناہا التوسع. (فتح القدیر:٦/٢٩٨، مکتبہ رشیدیہ)

قال فی رد المحتار: فی المجتبی عن الفضلی تحمل الشہادة فرض علی الکفایة کأدائہا والا لضاعت الحقوق وعلی ہذا الکاتب إلا أنہ یجوز لہ أخذ الأجرة علی الکتابة دون الشہادة فیمن تعینت علیہ بإجماع الفقہاء وکذا من لم تتعین علیہ عندنا وہو قول الشافعی وفی قول یجوز لعدم تعینہ علیہ شلبی. (رد المحتار: ٥/٤٦٤، کتاب الشہادات)

وفی المبسوط للعلامة السرخسی: لأن الکتابة عمل معلوم وہو یتحقق من المسلم والکافر ثم الاستیجار علیہ متعارف وقیل الاستیجار علی الکتابة کالاستیجار علی الصیاغة... أو کالاستیجار علی النقش وذلک جائز إذا کان معلوماً عند أہل الصنعة. (المبسوط: ١٦/٤٢)

Allāh taʿālā knows best.

Hiring out an item with the precondition of a penalty

Question

Some companies hire out utensils, crockery, etc. They lay down the condition that if any of the items are broken, the person will be charged for them. Is this a penalty according to the Sharīʿah? If this condition is not laid down, the company will suffer losses within a few months. It is not known whether the utensils were broken wittingly or by mistake. Kindly present the ruling of the Sharīʿah.

Answer

When possession is taken of the physical item in an ijārah, it is classified as a qabdah-e-amānat. We learn from the statements of the jurists that a condition of penalty on the amīn (the entrusted one) is invalid. However, they have permitted this condition with respect to an amīn in certain situations. For example, in the case of an ajīr mushtarak (co-owned hireling), some jurists say that a penalty has to be applied for the sake of protecting the goods of people. This reasoning is found in the present question as well. The muftīs ought to ponder over the permissibility of laying down a condition of a penalty.

يفسد الإجارة الشروط لأنها بمنزلة البيع أى فكل ما أفسد البيع أفسدها وأراد بالشروط شروطاً لا يقتضيها العقد. (تبيين الحقائق: ٥/١٢١، ملتان)

الفقه الحنفى فى ثوبه الجديد:

العين المستاجرة أمانة فى يد المستاجر إن تلفت بغير تفريط لم يضمنها... فإن شرط الموجر على المستاجر ضمان العين فالشرط فاسد لانه ينافى مقتضى العقد... (الفقه الحنفى فى ثوبه الجديد: ٤/٣٦١)

الدر المختار:

ولا تضمن بالهلاک من غير تعد وشرط الضمان باطل كشرط عدمه فى الرهن خلافاً للجوهرة حيث جزم بصيرورتها مضمونة بشرط الضمان... (الدر المختار مع رد المحتار: ٥/٦٥٩، سعيد)

خلاصة الفتاوىٰ:

ولو دفع الثياب إلى صاحب الحمام واستأجره وشرط عليه الضمان إذا تلف قال الفقيه أبو بكر: يضمن الحمامي إجماعاً وكان يقول: إنما لا يجب الضمان عند أبي حنيفة إذا لم يشترط الضمان والفقيه أبو جعفر سوى بينهما وكان يقول بعدم الضمان قال الفقيه ابو الليث وبه آخذ ونحن نفتى به. (خلاصة الفتاوى: ٣/١٣٧)

شرح عقود رسم المفتى:

والعرف فى الشرع له اعتبار - لذا عليه الحكم قد يدار

واعلم أن اعتبار العادة والعرف يرجع إليه في مسائل كثيرة حتى جعلوا ذلك أصلاً... ثم اعلم أن العرف قسمان عام وخاص فالعام يثبت به الحكم العام ويصلح مخصصاً للقياس والأثر... (شرح عقود رسم المفتى: ٧٥، ٨١)

Allāh ta'ālā knows best.

Paying a penalty when a hired item is stolen

Question

Is it permissible to charge a penalty if a hired item gets lost or stolen?

Answer

We learn from the statements of the jurists that a hired item is a trust in the control of the musta'jir. Therefore, if he did not fail in its safeguarding, there will be no penalty on him. However, nowadays, incidents of this nature are quite common due to the negligence of the musta'jir. It is also difficult to ascertain if he displayed negligence or not. The other point to consider is that most people hire items from companies and are lackadaisical in returning them. This results in losses to the company. Bearing in mind these challenges, there ought to be leeway if the verdict of paying a penalty is given out of kind consideration. The 'ulamā' need to ponder over this issue. A parallel to this – as gauged from the statements of the jurists – is the ajīr mushtarak. According to Imām Muhammad and Imām Abū Yūsuf

ra<u>h</u>imahumallāh, it is permissible to apply a penalty on him as a means of protecting the wealth of people.

المأجور أمانة فى يد المستاجر إن كان عقد الإجارة صحيحاً أو لم يكن لا يلزم الضمان إذا تلف المأجور فى يد المستاجر ما لم يكن بتقصيره أو تعديه أو مخالفته لمأذونيته. (شرح المجلة: ٢/٧٠٣، المادة: ٦٠٠و ٦٠١)

وفى الدر المختار: ولا يضمن ما هلك فى يده وإن شرط عليه الضمان ...قوله ولا يضمن ...وفى البدائع... وقالا: يضمن إلا من حرق غالب أو لصوص مكابرين وهو استحسان... وقولهما قول عمر وعلي رضي الله عنهما وبه يفتى احتشاماً لعمر وعلى وصيانة لأموال الناس. (الدر المختار مع رد المحتار: ٦/٦٥، سعيد)

وفى التبيين: لأن تضمين الأجير المشترک كان نوع استحسان عندهما صيانة لأموال الناس... فيجب عليه الضمان بما يمكن التحرز عنه حتى لا يتوانى فى حفظها وفى حاشية التبيين: حتى لا يقصر في حفظها أو لا يأخذ إلا بقدر ما يحفظه. (تبيين الحقائق: ٥/١٣٨، ط: ملتان)

وفي شرح عقود رسم المفتى: فقد ظهر لک أن جمود المفتى أو القاضى على ظاهر المنقول مع ترک العرف والقرائن الواضحة والجهل بأحوال الناس يلزم منه تضييع حقوق كثيرة وظلم خلق كثيرين. (شرح عقود رسم المفتى، ص ٨١)

Allāh taʿālā knows best.

Laying down a condition on a specific hireling

<u>Question</u>

Zayd owns a company. He said to ʿUmar: "If you sell the goods of my company, I will give you a salary plus an additional three percent. But the condition is that you cannot sell the goods of any other company." Is this agreement permissible?

Answer

The above agreement is permissible. In such a case, ʿUmar will be like an ajīr khā̱s (specific hireling). The condition which is laid down is permissible. In addition to his salary, he will receive an additional three percent as a broker.

وفى الحاوى سئل محمد بن سلمة عن أجرة السمسار فقال: أرجو أنه لا بأس به وإن كان فى الأصل فاسداً لكثرة التعامل وكثير من هذا غير جائز فجوزوه لحاجة الناس إليه كدخول الحمام. (فتاوى الشامى: ٦/٦٣)

The author of *al-Hidāyah* explains a law:

إلا أن يكون متعارفاً لأن العرف قاضٍ على القياس ولو كان لا يقتضيه العقد ولا منفعة فيه لأحد لا يفسده. (الهداية: ٣/٥٩)

Observe the following on the issue of making a condition with an ajīr khā̱s:

بأن استأجره للرعى حيث يكون مشتركاً إلا إذا شرط أن لا يخدم غيره ولا يرعى لغيره فيكون خاصاً... وليس للخاص أن يعمل لغيره. (الدر المختار: ٦/٦٩، سعيد)

وشرط أن لا يرعى مع غنمه غنماً آخر جاز. (الفتاوى السراجية، ص: ٤٦٢)

Imdād al-Fatāwā:

An ajīr khā̱s is not permitted to do any work apart from the work which is assigned to him in the time that is given to him. Yes, unless he obtains permission to do it. And the permission too has to be from the one who is paying him or his representative. That will be considered as a permission.[1]

Allāh taʿālā knows best.

[1] *Imdād al-Fatāwā*, vol. 3, p. 388.

Repairing a machine when it is damaged a second time

Question

Zayd took a machine to the shop of a mechanic. The latter fixed the machine. A ten-year old child came into the shop and began playing with the machine. It stopped working. Is the mechanic liable to repair it again? Can the mechanic ask for an additional payment for the repair? Is the child's father liable to pay for the damages?

Answer

Once Zayd placed his machine in the mechanic's shop, it falls under the responsibility of the mechanic. As long as he does not hand it over to Zayd after repairing it, he is responsible for its protection. Since the failing is from his side – due to which the child came in and broke it – it will be necessary for the mechanic to re-repair the machine. He cannot ask for an additional payment for the second repair. Yes, he can hold the child accountable. If the child does not have any money at the time, the mechanic may wait until he is able to pay for it. However, the child's father will not be liable to pay for the damages. If the mechanic himself broke it, it will be obligatory on him to repair it a second time.

اعلم أن الهلاک بفعل الأجير أولا والأول إما بالتعدى أو لا والثاني إما أن يكون الاحتراز عنه أولا ففى الأول بقسميه يضمن اتفاقاً وفى ثانى الثانى: لا يضمن اتفاقاً وفى أوله لا يضمن عند الإمام مطلقاً ويضمن عندهما مطلقاً، وفى البدائع: لا يضمن عنده ما هلك بغير صنعه قبل العمل أو بعده لأنه أمانة فى يده وهو القياس وقالا: يضمن إلا من حرق غالب أو لصوص مكابرين وهو استحسان وقولهما قول عمر وعلى وبه يفتى احتشاماً لعمر وعلى وصيانة لأموال الناس. (فتاوى الشامى: ٦/٦٥، سعيد)

وفى الدر المختار: ثوب خاطه الخياط بأجر ففتقه رجل قبل أن يقبضه رب الثوب فلا أجر له لأن الخياطة مما له أثر فلا أجر قبل التسليم كما فى المبيع بل له تضمين الفاتق أى قيمة خياطه لا المسمى لأنه إنما لزم بالعقد ولا عقد بينه وبين الفاتق ولا يجبر على الإعادة لأنه التزم العمل ووفى به وإن كان

الخياط هو الفاتق فعليه الإعادة كأنه لم يعمل فلم يوف ما التزمه من العمل فيجبر عليه لأن عقد الإجازة لازم وهل للخياط أجر التفصيل بلا خياطة الأصح لا. (الدر المختار مع رد المحتار: ٦/١٥، وكذا فى المحيط البرهانى: ٩/٢٣٨)

وفى المحيط البرهانى: وهذا لأنه لما خرج الخبز من التنور فقد أتم العمل لأنه عمله جعل الدقيق خبزاً ومتى أخرجه من التنور صار منتفعاً به انتفاع الخبز فيتم عمله وصار مسلماً لقيام يد المستاجر على الخبز... فلا يبرأ عن الضمان إلا بالتسليم. (المحيط البرهانى: ٩/١٣٩، والدر المختار: ٦/١٤)

إذا أتلف صبي مال غيره يلزم الضمان من ماله وإن لم يكن له مال ينتظر إلى حال يساره ولا يضمن وليه لأن الصغير وإن كان محجوراً عليه لذاته إلا أن الحجر عليه فى أقواله لا فى أفعاله فهو مواخذ بأفعاله فيضمن ما أتلفه من المال قال فى كتاب أحكام الصغار للأستروشنى: صبى بال على السطح فخرج البول من الميزاب وأصاب ثوب رجل فأفسده يغرم الصبى من ماله فإن لم يكن له مال يكون ديناً عليه يواخذ به إذا أيسر. (شرح المجلة: ٣/٤٥٧)

Allāh ta'ālā knows best.

Giving trees on rent

Question

Is it permissible to give trees on rent? If it is impermissible, is there any way of circumventing the impermissibility?

Answer

It is impermissible to give trees on rent because it entails destruction of the item, whereas the purpose of ijārah is to derive benefit from an item while maintaining its existence.

The 'ulamā' explain one way of doing this. The owner gives the trees on the basis of musāqāt as follows: From one thousand, one share is for the owner while the remaining parts are for the irrigators. After that, the same person is given on a normal rental by adding that amount which was deducted from the musāqāt agreement. The pre-condition is that the land must cultivable. Also, this circumvention can only be

correct if the trees do not belong to a waqf or orphans. If someone resorts to this circumvention in waqf property or property belonging to orphans, then both agreements will be invalidated. The musāqāt will be invalid because it entails a disadvantage to the waqf and the orphans. The ijārah is invalid because it was done after the invalidity of the musāqāt. It is as though the ijārah was concluded on property which was already occupied in some other agreement; and this is invalid. The condition of the musāqāt agreement being before the circumvention was laid down because if it was the other way around, the ijārah of the land will become invalid. (As gauged from *Fatāwā 'Uthmānī*, vol. 3, p. 379)

Another way of making it permissible is to give the land on rent and permit the tenant to use the trees. Later on, to save one's self from the possibility of the owner retracting the permission, include the following type of words in the agreement: "Each time I retract the permission, you will be permitted."

ولا يجوز بيع المراعى ولا إجارتها--وأما الإجارة فلأنها عقدت على استهلاک عين مباح ولو عقدت على استهلاک عين مملوک بأن استاجر بقرة لشرب لبنها لا يجوز فهذا أولى- (الهدایة :٣/٥٤)-

Fatāwā Rashīdīyyah:

It is impermissible to rent out trees because an ijārah is of benefits, while actual and additional items are for sale...[1]

Fatāwā Mahmūdīyyah:

The purpose of an ijārah is to derive benefit from the hired item. To do farming on a piece of rented land and harvest crops from it is included in the ijārah. But to acquire fruit from the owner's land is not included in the ijārah. This will be a sale.[2]

وأفاد فساد ما يقع كثيراً من أخذ كرم الوقف أو اليتيم مساقاة، فيستأجر أرضه الخالية من الأشجار بمبلغ كثير ويساقي على أشجارها بسهم من ألف سهم فالحظ ظاهر فى الإجارة لا فى المساقاة فمفاده فساد المساقاة بالأولى.

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[1] *Fatāwā Rashīdīyyah*, p. 546.

[2] *Fatāwā Mahmūdīyyah*, vol. 16, p. 559. Also *Imdād al-Ahkām*, vol. 3, p. 575.

(بالأولى) ...ثم اعلم أنه حيث فسدت المساقاة بقيت الأرض مشغولة فيلزم فساد الإجاره أيضا كما قدمناه وإن كان الحظ والمصلحة فيها ظاهرين، فتنبه لهذه الدقيقة. وفي فتاوى الحانوتي: التنصيص فى الإجاره على بياض الأرض لا يفيد الصحه حيث تقدم عقد الإجاره على عقد المساقاة، أما إذا تقدم عقد المساقاة بشروطه كانت الإجارة صحيحة كما صرح به فى البزازية... وهذا بالنسبة إلى الوقف وأما مساقاة المالك فلا ينظر فيها إلى المصلحة كما لو آجر بدون أجر المثل. (الدر المختار مع رد المحتار: ٨/٦-٩، سعيد)

وفى الدر المختار: وإن استاجر الشجر إلى وقت الإدراك بطلت الإجارة... والحيلة... أن يشترى. وفى الشامية: قوله (وأن يشترى الخ) هذه حيلة ثانية وبيانها أن المشترى إما أن يكون مما يوجد... أو لم يوجد منه شيء... أو يكون وجد بعضه دون بعض كثمر الأشجار المختلفة الأنواع... وفى الثالث يشترى الموجود من الثمر بكل الثمن ويحل له البائع ما سيوجد لأن استئجار الأرض لا يتاتى هنا لأن الأشجار باقية على مالك البايع. (الدر المختار مع رد المحتار: ٤/٥٥٨، سعيد)

قال الرافعى: (لأن استئجار الأرض...) لا يدخل لعدم تاتى إجارة الأرض هنا فإنه لو قيل بصحتها لا يحل للمشترى ما سيوجد من الثمار فالعمدة فى حله هو الاحلال. (التحرير المختار: ٤/١١٨، سعيد)

وفى الأشجار الموجود ويحل له البائع ما يوجد فإن خاف أن يرجع يقول: على أنى متى رجعت فى الإذن تكون مأذوناً فى الترك. شمنى ملخصاً.

وفى الشامية: (قوله وفى الاشجار الموجود) أى وفى ثمار الاشجار يشترى الموجود منها. (فإن خاف الخ)... وحاصله: أنه على قول محمد يمكن الرجوع هنا عن الإحلال بأن يقول: رجعت عن الإحلال المعلق وعن المنجز فيتعين

حينئذ الاحتيال بالعاملة على الاشجار. (الدر المختار مع رد المحتار: ٤/٥٥٨، سعيد)

قال الرافعى (فيتعين حينئذٍ الاحتيال...) وفى السندى بعد ذكره عن الرحمتى نحو ما ذكره المحشى ما نصه فالحيلة عند ذلك ان يقول على أنى كلما رجعت فى الإذن تكون أيها المشترى مأذوناً فى الترک بإذن جديد فلا يصح له رجوع عن الإذن المعلق وابطال المنجز لمراعاة لفظه كلما كما حققه أهل الأصول. (التحرير المختار: ٤/١١٨، سعيد)

It is hard to understand the first circumvention and difficult to put into practice. Furthermore, the owner who will give trees on rent will generally have nothing to do with the fruit from the trees. In the present scenario, the owner's relationship with the trees will be one in one thousand. This is why the second circumvention is easier to practise on.

Allāh taʿālā knows best.

REPRESENTATION

Representation on behalf of both parties

<u>Question</u>

Can a person act as a representative on behalf of a seller and buyer?

<u>Answer</u>

Most jurists say that the same person cannot be a seller and buyer. However, some jurists say that if he gets the permission of the mandator, he can be a representative on behalf of both – the buyer and seller.

قال فى البزازية: الوكيل بالبيع لايملك شراءه لنفسه لأن الواحد لا يكون مشترياً و بائعاً فيبيعه من غيره ثم يشتريه منه وإن أمره الموكل أن يبيعه من نفسه أو أولاده الصغار أو ممن لا تقبل شهادته فباع منهم جاز. (البحر الرائق: ٧/١٦٦، كوئته)

وفي وكالة الطحاوي: لا يجوز بيع الوكيل من نفسه أو ابن صغير له أو عبد له غير مديون، وإن أمره الموكل بالبيع من هؤلاء أو أجاز له ما صنع جاز. (تكملة رد المحتار: ٧/٣٣٢، سعيد)

Furthermore, a representative is like a broker. The only difference is that a broker takes a payment while a representative works without a wage and also with a wage. Since a broker can work by taking a payment from both parties, a representative is more permitted to act on behalf of both parties without a payment.

السمسار وهي أن يوكل الرجل من الحاضر البادية فيبيع لهم ما يجلبونه... (حاشية الهداية: ٢/٢٦٦)

فتجب الدلالة على البائع أو المشترى أو عليهما بحسب العرف، جامع الفصولين. (رد المحتار: ٤/٥٦٠، سعيد)

Allāh taʿālā knows best.

A representative buying for himself

<u>Question</u>

Zayd appointed ʿUmar as his sales representative. Can ʿUmar buy that item for himself by paying for it at a similar price?

<u>Answer</u>

There are two opinions with regard to a sales representative purchasing an item for himself. One is that it is impermissible while the other is that it is permissible if he obtains the permission of the mandator. In the above case, if Zayd permitted him, he may buy the item for himself.

الوكيل بالبيع لا يملك شراءه لنفسه لأن الواحد لا يكون مشترياً وبائعاً فيبيعه من غيره ثم يشتريه منه... وإن أمره الموكل أن يبيعه من نفسه أو أولاده الصغار أو ممن لا يقبل له شهادته فباع منهم جاز. (الفتاوى البزازية على هامش الهندية: ٥/٤٧٥، الرابع فى البيع)

Allāh taʿālā knows best.

Selling an item at a higher price than what was stipulated

<u>Question</u>

A person is appointed as a sales representative and is told the price at which the item should be sold. If he sells it at a higher price, the jurists say that the additional amount will also go to the mandator. Is there any way of circumventing this so that the additional amount goes to the representative?

<u>Answer</u>

As per one view of the jurists, a sales representative can buy an item for himself if he gets the permission of the mandator. In the light of this view, an easy way of circumvention could be for the representative to buy the item for himself at the specified price. He must inform the seller that he bought it himself. After buying it, the representative has become the owner of the item. He can then sell it to someone at a higher price and keep the additional amount for himself.

الوكيل بالبيع لا يملك شراءه لنفسه لأن الواحد لا يكون مشترياً وبائعاً فيبيعه من غيره ثم يشتريه منه... وإن أمره الموكل أن يبيعه من نفسه أو أولاده

الصغار أو ممن لا يقبل له شهادته فباع منهم جاز. (الفتاوى البزازية على هامش الهندية: ٥/٤٧٥، الرابع فى البيع)

الدر المختار:

لا يعقد وكيل البيع والشراء مع من ترد شهادته له للتهمة وجوازه بمثل القيمة إلا من عبد ومكاتبه إلا إذا أطلق له الموكل كـ بع ممن شئت فيجوز بيعه لهم بمثل القيمة اتفاقاً ...وفى السراج: لو صرح بهم جاز إجماعاً إلا من نفسه وطفله وعبده غير المديون. وفي رد المحتار: قوله إلا من نفسه، وفى السراج: لو أمره بالبيع من هؤلاء فإنه يجوز إجماعاً إلا أن يبيعه من نفسه أو ولده الصغير أو عبده ولا دين عليه فلا يجوز قطعاً وإن صرح به الموكل، الوكيل بالبيع لا يملك شراءه لنفسه... (بزازية) كذا فى البحر، ولا يخفى ما بينهما من المخالفة، وذكر مثل ما فى السراج فى النهاية عن المبسوط، ومثل ما فى البزازية فى الذخيرة عن الطحاوي وكأن فى المسئلة قولين خلافاً لمن يدعي أنه لا مخالفة بينهما. (الدر المختار مع رد المحتار: ٥/٥٢١،٥٢٢، سعيد. وكذا فى البحر الرائق مع الحاشية منحة الخالق: ٧/١٦٧، كوئته)

حاشية الطحطاوى:

قوله إلا من نفسه أى وقد أمره بالبيع ممن لا تقبل شهادته له قال فى السراج: لو أمره بالبيع من هؤلاء فإنه يجوز إجماعاً إلا أن يبيعه من نفسه أو ولده الصغير أو عبده ولا دين عليه فلا يجوز قطعاً وإن صرح به الموكل، وهذا لا ينافي ما فى البزازية أنه يجوز لنفسه فإن محله إذا صرح له بالعقد من نفسه. (حاشية الطحطاوى على الدر المختار: ٣/٢٧٦، كوئته)

...لا يجوز للوكيل أن يبيع سلعة الموكل على بيعها لنفسه... أما إذا أذنه الموكل بأن يبيع لنفسه أو لابنه الصغير ففيه رأيان: أحدهما: أنه لا يجوز، لأن العاقد

في هذه الحالة يكون واحداً، ثانيهما: أنه يجوز ويظهر أن الذي يقول بعدم الجواز لعلة كون العاقد واحداً لا يمنع أن يبيع الوكيل السلعة لاجنبي ثم يشتريها منه ثانياً لأنه في هذه الحالة يكون البائع غير المشترى. (كتاب الفقه على المذاهب الاربعة، مبحث الوكالة بالبيع والشراء، ٣/١٤٥)

Allāh ta'ālā knows best.

Being a representative for something which is against the Shari'ah

<u>Question</u>

Is it permissible for a Muslim representative to accept a work which is against the Sharī'ah?

<u>Answer</u>

The profession of representation is permissible in itself as long as the person remains within the limits of the Sharī'ah. Representation in matters which are in conflict with the Sharī'ah is impermissible. The representative and the mandator are both accountable – it is obligatory and necessary for both to adhere to the Sharī'ah. It is essential to abstain from anything which is against the Sharī'ah, e.g. speaking lies, cheating, treachery, false leeway and so on.

وَلاَ تَكُنْ لِّلْخَآئِنِيْنَ خَصِيْمًا

Do not be an advocate on behalf of the treacherous.[1]

عن عروة عن زينب بنت أم سلمة عن أم سلمة عن النبي صلى الله عليه وسلم، قال: إنما أنا بشر وإنكم تختصمون ولعل بعضكم أن يكون ألحن بحجته من بعض فأقضي له على نحو ما أسمع فمن قضيت له من أخيه شيئاً فلا يأخذ فإنما أقطع له قطعة من النار. (رواه البخارى: ٢/١٠٣٠)

شرح العناية:

[1] Sūrah an-Nisā', 4: 105.

قال (كل عقد جاز أن يعقده الإنسان بنفسه الخ) هذه ضابطة يتبين بها ما يجوز التوكيل به وما لا يجوز. (شرح العناية بهامش فتح القدير: ٧/٥٠١، كتاب الوكالة، دار الفكر)

وإن علم من الموكل القصد إلى الإضرار بالمدعي ليشتغل الوكيل بالحيل والأباطيل والتلبيس لا يقبل منه التوكيل. (فتاوى قاضيخان: ٣/٧)

والكلام فيما إذا كان الوكيل ألحن من الموكل وأبلغ وأهدى منه إلى وجوه الخصومات لا سيما إذا كان الموكل صالحاً يتقي عن استخراج الحيل والدعاوى الباطلة للغلبة والوكيل بضده، فلا بد أن فى وكالته ضراراً بالآخر، فلا يلزم إلا بالتزامه، ومن شاهد حال وكلاء الزمان في إحقاقهم الباطل، وإبطالهم الحق لم يشك قط في صحة قول أبي حنيفة... وأكثر ما يقع التاخير في معرفة الحق من الباطل إنما هو من تلبيسات الوكلاء وتحيلهم على الحق ولبسهم الباطل بالصواب والفقهيه من عرف حال زمانه. (اعلاء السنن: ١٥/٣٢١، كتاب الوكالة، ادارة القرآن)

Imdād al-Fatāwā:

...To conclude, the profession of being an advocate/lawyer is permissible in itself with the provision that the advocate accepts true cases.[1]

Fatāwā Mah̲mūdīyyah:

If the advocate accepts true and genuine cases, and he does not have to commit an offence against the Sharī'ah, then the profession of an advocate is permissible.

If payment is taken for representing a sin – i.e. a false case is pursued and a wrongdoer is defended – then a representation of this nature is impermissible and its income is impermissible.[2]

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[1] *Imdād al-Fatāwā*, vol. 3, p. 320.

[2] *Fatāwā Mah̲mūdīyyah*, vol. 16, pp. 452-453.

Āp Ke Masā'il:

If an advocate collects fees by proving falsehood to be true and vice versa, then this is obviously not halāl. If he pursues a case correctly and honestly, then there is no reason to label his income as harām.[1]

Yes, if he has to resort to stratagems to repulse wrongs and injustices, there is leeway for it.

ومعلوم أن الوكيل إنما يقصد عادة لاستخراج الحيل والدعوى الباطلة ليغلب وإن لم يكن الحق معه، وفي هذا إضرار بالآخر، فلا يلزم إلا بالتزامه إلا إذا كان معذوراً. (اعلاء السنن: ١٥/٣٢١، باب الوكالة بالخصومة، ادارة القرآن)

إذا تعارض مفسدتان روعي أعظمهما ضرراً بارتكاب أخفهما. (الاشباه والنظائر: ١/٢٦١، تحت القاعدة الخامسة: الضرر يزال)

There is also room for a person to resort to stratagems and ambiguity for the sake of reconciling two opposing parties.

> عن ابن شهاب أن حميد بن عبد الرحمن أخبره أن أمه أم كلثوم بن عقبة أخبرته أنها سمعت رسول الله صلى الله عليه وسلم يقول: ليس الكذاب الذي يصلح بين الناس فينمي خيراً أو يقول خيراً. (رواه البخارى: ١/٣٧١، باب ليس الكاذب الذى يصلح بين الناس)
>
> ...Rasūlullāh sallallāhu 'alayhi wa sallam said: The person who advances the good or says a good word to reconcile people is not a liar.

Allāh ta'ālā knows best.

When a representative for a purchase receives something for free

Question

Someone appointed Zayd as a representative to go and buy a goat or sheep from the market. He gave him R1 000.00 for the purchase. The

[1] *Āp Ke Masā'il*, vol. 8, p. 276.

seller in the market gave the animal to Zayd for free because of their relationship. Will the representative have to return the R1 000.00 to the mandator or is there room for him to keep it for himself? He was told that the price of the animal is R1 000.00

Answer

Based on his relationship with the seller, the latter returned the R1 000.00 to the representative. This money is a gift to the representative. Therefore, there is no need for him to return the money to the mandator. He may keep it for himself.

الفتاوى الولوالجية:

رجل أمر رجلاً يشتري له جارية بألف درهم فاشتراها ثم أن البائع وهب للوكيل ألفاً فللوكيل أن يرجع على البائع بألف، لأنه لا يمكن أن يجعل هذا حطاً عن الثمن، لأنه يفسد العقد فجعل هبة فيرجع. (الفتاوى الولوالجية: ٤/٣٥٣، فصل فيما يرجع الوكيل على الموكل)

البحرالرائق:

وفى الواقعات الحسامية: ولو أمر رجلاً أن يشتري جارية بألف فاشتراها ثم أن البائع وهب الألف من الوكيل فللوكيل أن يرجع على الآمر. (البحر الرائق: ٧/١٥٥، باب الوكالة بالبيع والشراء، كوئته)

الدر المختار:

ولو وهبه كل الثمن رجع بكله ولو بعضه رجع بالباقي لأنه حط. وفى الشامي:(قوله كل الثمن) أى جملة واحدة، قال فى البحر: ولو وهبه خمس مائة ثم الخمسمائة الباقية لم يرجع الوكيل على الآمر إلا بالأخرى لأن الأولى حط والثانية هبة. (الدر المختار مع فتاوى الشامى: ٥/٥١٦، باب الوكالة بالبيع والشراء، سعيد)

Allāh taʿālā knows best.

The difference between a representative and a broker

<u>Question</u>

What is the difference between a representative and a broker?

<u>Answer</u>

A broker carries out a task which was given to him by someone else in exchange for a payment. A representative may do this for or without a payment.

السمسار: من يعمل للغير بالأجر بيعاً أو شراء ويقال له فى العرف الدلال. (دستور العلماء: ٢/١٣٢)

والوكالة:..وفى الشرع تفويض التصرف في أمر شرعي إلى غيره أى إقامة الغير مقام نفسه فى التصرف ممن يملك التصرف. والوكيل: هو الذي فوض إليه التصرف بإقامة المفوض أى الموكل إياه مقام نفسه فى التصرفات. (دستور العلماء: ٣/٣٢١)

الدلال هو السمسار أى الذي يدخل بين البائع والمشتري متوسطاً لإمضاء البيع. (التعريفات الفقهية: ١/٢٩٣)

والوكالة، وهي شرعاً تفويض أحد أمره لآخر وإقامته مقامه ويقال لذلك الشخص موكل ولمن إقامه وكيل والأمر موكل به. (التعريفات الفقهية: ١/٥٤٦)

Islāmī Fiqh:

Representation is of two types; specific and general. An example of a specific representation is when you say to a person: "Buy me a car for this amount of rupees, or represent me for such and such court case." An example of a general representation is when you say to a person: "You must do full supervision of my business, or represent me for all my court cases." Each of these two types are subdivided into another two categories: (1) with payment, (2) without payment. The rules governing both are the same. Only in one transaction, the unpaid representative's responsibility becomes less.

A paid representative includes all those who do a job for a payment or a commission. All the employees of a government are its

representatives. This is why they have to do their work as per the instructions of their government. If you ask your personal employee to do a job, he will be considered to be your representative. Similarly, if you appoint a commission agent, he will be considered to be your representative. In other words, he has to work as per the guidelines laid down by you.[1]

Allāh taʿālā knows best.

A mandator reselling the goods to his representative

Question

A mandator takes possession of the item and pays its price. After this, can he resell the item to his representative on the basis of murābahah?

Answer

In this case, the mandator took possession of the item and also paid for it. It is now permissible for him to sell it to his representative on the basis of murābahah.

وفسد شراء ما باع بنفسه أو بوكيله من الذي اشتراه... بالأقل من قدر الثمن الأول قبل نقد كل الثمن الأول وفى رد المحتار: قيد به لأن بعده لا فساد. (الدر المختار مع رد المحتار: ٥/٧٣، سعيد)

قوله بالأقل من قدر الثمن الأول... وقيد بالأقل لأنه لو كان بمثله أو بأكثر منه جاز لأن الفضل فى الأكثر يحصل للمشتري والمبيع داخل في ضمانه... وقيد بكونه قبل النقد لأنه إذا كان بعده لا فساد. (حاشية الطحطاوى على الدر المختار: ٣/٧٣، كوئته)

ومن اشترى جارية بألف درهم حالة أو نسيئة ثم باعها من البائع بخمس مائة قبل أن ينقد الثمن الأول لا يجوز البيع الثاني، وفي فتح القدير: بمثل الثمن أو أكثر جاز... وقيد بقوله قبل نقد الثمن لأن ما بعده يجوز بالإجماع. (الهداية مع فتح القدير: ٦/٤٣٢، دار الفكر)

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[1] *Islāmī Fiqh*, vol. 2, p. 647.

Allāh taʿālā knows best.

A general and specific representation

Question

A person appointed another as his representative. He may buy trade goods when he wills at a specified price, but the nature and type of goods were not described. Is this a general or a specific representation?

Answer

It is a general representation with respect to the goods, but a specific representation with respect to specifying the price. An example of specifying a representation could be: You may buy for me whatever goods you want from such and such market.

قوله وإن عمت بأن يقول ابتع لي ما رأيت لأنه فوض الأمر إلى رأيه فأى شيء يشتريه يكون ممتثلاً، درر. (رد المحتار: ٥/٥١٥، سعيد)

...إلا أن يوكله وكالة عامة فيقول: ابتع لي ما رأيت لأنه فوض الأمر إلى رأيه فأى شيء يشتريه يكون ممتثلاً والأصل فيه أن الجهالة اليسيرة تتحمل فى الوكالة كجهالة الوصف استحساناً لأن مبنى التوكيل على التوسعة لأنه استعانة. (الهداية: ٣/١٨١، باب الوكالة بالبيع والشراء)

وفى الدر المختار: وبشراء دار أو عبد جاز إن سمى الموكل ثمناً يخصص نوعاً أولا. (الدر المختار: ٥/٥١٥، سعيد)

Allāh taʿālā knows best.

When a representative spends his mandator's money on himself

Question

Observe the following scenarios:

1. A person has someone's money which has been kept with him as a trust.
2. A person has the donations of a masjid with him.
3. A person is appointed as a representative for the payment of a debt.

4. A person is appointed as a representative for the purchase of an item.

In each of these cases, the representative spends the money for his personal needs. He then gives another money to the owner, replaces the money in the masjid donations, or pays the debt on behalf of his mandator. Is it permissible for him to do this?

Answer

A representative may do this if he got the permission of his mandator. He cannot do it without his permission. This is because the money which is given to the representative is given as a trust; and it is impermissible to use a trust without the mandator's permission. In the same way, waqf money cannot be used in any way. If anyone does use it, he will be liable. Yes, as an act of kindness, if it is difficult to solve the case by a judge, and an alternative to the spent money is spent as specified by the mandator, then there is hope that the representative will be saved from punishment in the court of Allāh taʿālā.

If someone gives ten dirhams to Zayd to buy something, to spend it on his family or to pay a debt; and he carried out these tasks with his own money, and then kept the mandator's money for himself, this will be permissible.

رجل جمع مالاً من الناس لينفقه في بناء المسجد وأنفق من تلك الدراهم في حاجة نفسه ثم رد بدلها في نفقة المسجد لا يسعه أن يفعل ذلك وإذا فعل إن كان يعرف صاحب المال رد الضمان عليه أو يساله ليأذن له بإنفاق الضمان فى المسجد، وإن لم يعرف صاحب المال يرفع الأمر إلى القاضي حتى يأمره بإنفاق ذلك فى المسجد فإن لم يقدر على أن يرفع الأمر إلى القاضي، قالوا: نرجوا له فى الاستحسان أن ينفق مثل ذلك من ماله فى المسجد فيجوز ويخرج عن الوبال فيما بينه وبين الله تعالىٰ وفى القضاء يكون ضامناً فيكون ذلك ديناً عليه لصاحب المال، وهو نظير ما ذكر فى الأصل الوكيل بقضاء الدين إذا صرف مال الموكل في حاجة نفسه ثم قضى بمال نفسه دين الموكل يكون متبرعاً في قضاء دين الموكل. (فتاوىٰ قاضيخان: ٣/٢٩٩)

الوكيل بالشراء أنفق الدراہم على نفسہ ثم اشترى ما أمر بدراہم من عنده فالمشتري للوكيل لا للآمر فى المختار وفى الأصل اشترى بدنانير من عنده ثم نقد دنانير الموكل فالشراء للوكيل ويضمن مال الموكل للتعدى، ولو اشترى ما أمره وسلمہ إلى الموكل ثم أنفق دراہم الوكالة ونقد للبائع غيرہا جاز،... وفى النوازل أعطاه ديناراً لقضاء دينہ أو الإنفاق على عيالہ فأمسكہا وصرف دينار نفسہ جاز استحساناً وفى العيون أمره بصدقة ألف وأعطاه فأنفقہ وتصدق بألف من عنده لا يجوز ويضمن وإن باقية عنده وتصدق بألف من عنده جاز استحساناً. (الفتاوى البزازية: ٥/٤٨٣)

وللاستزادة انظر: (الفتاوى الہندية: ٣/٦٤٤. والفتاوى التاتارخانية: ٥/٨٥٦)

Allāh ta'ālā knows best.

Making the representative liable for the amount of money

Question

A person appointed Zayd as a sales representative and asked him to sell the goods at a certain price. However, he laid down the condition that he will have to give him that amount of money irrespective of whether he collects that amount from the buyer or not. Will the representative be liable to do this?

Answer

It is impermissible and incorrect to lay down such a condition.

(قولہ ومن باع لرجل ثوباً) أى باع ثوباً ہو لرجل بطريق الوكالة عنہ في بيعہ (وضمن) الوكيل (لہ) أى للرجل المالک (الثمن أو مضارب ضمن ثمن متاع لرب المال فالضمان باطل لأن الكفالة) وہى الضمان (التزام المطالبة والمطالبة إليہما) أى إلى الوكيل والمضارب (فيصير كل منہما ضامناً لنفسہ) فيصير مطالباً مطالباً وہذا لأن حقوق العقد ترجع إليہما. (فتح القدير: ٧/٢١٨، دار الفكر)

ولا تصح كفالة الوكيل بالثمن للموكل فيما لو وكل ببيعه لأن حق القبض له بالإصالة فيصير ضامناً لنفسه. وفي رد المحتار: (قوله ولا تصح كفالة الوكيل بالثمن) وكذا عكسه،... (وقوله فيما لو وكله ببيعه) الأولى أن يقول أى ثمن ما وكل ببيعه، قيد به لأن الوكيل بقبض الثمن لو كفل به يصح كما فى البحر. (الدر المختار مع رد المحتار: ٥/٣١٢، سعيد)

يجب أن يعلم أن الحقوق نوعان حق يكون للوكيل وحق يكون على الوكيل فالأول كقبض المبيع ومطالبة ثمن المشتري والمخاصمة فى الغيب والرجوع بثمن مستحق، ففي هذا النوع للوكيل ولاية هذه الأمور لكن لا تجب عليه، فإن امتنع لا يجبره الموكل على هذه الأفعال، لأنه متبرع فى العمل بل يوكل الموكل بهذه الأفعال. (فتح القدير: ٨/١٦، دار الفكر)

Allāh taʿālā knows best.

Charging a fee for a proxy agreement

Question

A person came to an Islamic bank, filled an agreement form and signed it. Before he could sign the proxy/representative form, he cancelled the agreement. Is it permissible for the bank to collect fees from him?

Answer

This fee is known, pre-conditioned or promised. It is in exchange for the bank paperwork. It is therefore permissible and correct for it to collect this fee.

ذكر الشرط على وجه المواعدة جاز البيع ويلزمه الوفاء بالوعد لأن المواعدة قد تكون لازمة فتجعل لازمة لحاجة الناس. (فتاوىٰ قاضيخان على هامش الهندية: ٢/١٦٥)

والعرف ينفى النزاع... فلم يبق من الموانع إلا القياس على ما لا عرف فيه بجامع كونه شرطاً والعرف قاضٍ عليه. (شرح العناية: ٦/٤٤٢، دار الفكر)

نقل عن جامع الفصولين أنہ لو ذكر البيع بلا شرط، ثم ذكر الشرط على وجہ العدة، جاز البيع ولزم الوفاء بالوعد، إذ المواعيد قد تكون لازمة فيجعل لازماً لحاجة الناس. (شرح المجلة: ٢/٦١)

Ahsan al-Fatāwā:

It is essential for both parties to adhere to the agreement. The one who cancels it can be compelled to fulfil the agreement.[1]

Allāh taʿālā knows best.

Laying down restrictions on a representative

Question

A person laid down this condition to his representative: "You may only sell my goods." Can the representative sell his own goods with the goods of his mandator?

Answer

A sales representative is like an ajīr mushtarak (co-partnered hireling). The agreement was made on the sale of goods. When the mandator laid down the condition that the representative may only sell his goods, he has become like an ajīr khās (specific hireling). Thus, at the time of the ijārah, it is impermissible for him to sell his own goods. Yes, if the hireling did not accept this condition, or accepted it but sells his own goods from his house at a time which is different from the ijārah time, he will be permitted to do that. Alternatively, he does not sell the goods himself, but his son or wife sells them. This will also be permissible.

الأجير المشترك من يعمل لغير واحد... والأجير الخاص يستحق الأجر بتسليم نفسہ فى المدة وإن لم يعمل... وسمى الأجير خاصاً ووحده لأنہ يختص بالواحد وليس لہ أن يعمل لغيره ولأن منافعہ صارت مستحقة للغير والأجر مقابل بها فيستحقہ ما لم يمنع مانع من العمل كالمرض والمطر... وإنما يكون أجيراً

[1] *Ahsan al-Fatāwā*, vol. 6, p. 550.

خاصاً إذا شرط عليہ أن لا يرعى لغيره. (البحر الرائق: ٢٦، ٣٠، ٣١ كتاب الاجارة، كوئتہ)

الأجراء على ضربين: مشترك وخاص، فالأول من يعمل لا لواحد كالخياط ونحوه أو يعمل لہ عملاً غير موقت... أو موقتاً بلا تخصيص... والثاني وہو الأجير الخاص ويسمى أجير وحد وہو من يعمل لواحد عملاً موقتاً بالتخصيص ويستحق الأجر بتسليم نفسہ فى المدة وإن لم يعمل كمن استوجر شهراً للخدمة أو شهراً لرعي الغنم المسمى بأجر بخلاف ما لو آجر المدة بأن استاجره للرعي شهراً حيث يكون مشتركاً إلا إذا شرط أن لا يخدم غيره ولا يرعى لغيره فيكون خاصاً. وفي رد المحتار: اعلم أن الأجير للخدمة أو لرعي الغنم إنما يكون أجيراً خاصاً إذا شرط عليہ أن لا يخدم غيره أو لا يرعى لغيره. (قولہ وليس للخاص أن يعمل لغيره) بل ولا يصلى النافلة، قال فى التتارخانية: وفي فتاوى الفضلى وإذا استاجر رجلاً يوماً يعمل كذا فعليہ أن يعمل ذلک العمل إلى تمام المدة. (الدر المختار مع رد المحتار: ٦/٦٤، كتاب الاجارة، سعيد)

Allāh taʿālā knows best.

A sales representative keeping goods as a mortgage

Question

Zayd appointed ʿAmr as his representative to sell some goods. Is it correct for ʿAmr to say – for his fees - he will keep the goods as a mortgage or guarantee until he sells the goods?

Answer

A sales representative may keep the goods with him as a wadīʿat (safekeeping) in return for payment until he sells them. He cannot keep them as a mortgage or guarantee. In other words, he should make two agreements. (1) This will be his daily payment until he sells the goods. (2) After he sells the goods, he will receive a certain percentage of the value. He must make these two agreements to save himself from s̲afqah fī s̲afqah. After he sells the goods, he may collect a

rental for the number of days that the goods were with him. This is because it is not the sales representative's duty to keep the goods in his shop. He can therefore collect a payment for this. Yes, if the goods get destroyed, then as per one ruling, he will have to pay a penalty.

المودع إذا شرط الأجرة للمودع على حفظ الوديعة صح ولزم عليہ. (الفتاوى الهندية: ٤/٣٤٢)

المودع إذا شرط للمودع أجراً على حفظ الوديعة أن لہ الأجر لأن حفظ الوديعة ليس بواجب عليہ فجاز شرط الأجر. (بدائع الصنائع: ٦/١٥١، سعيد)

وہي (الوديعة) أمانة، ہذا حكمها مع وجوب الحفظ والأداء عند الطلب واستحباب قبولها، فلا تضمن بالهلاک إلا إذا كانت الوديعة بأجر... (الدر المختار: ٥/٦٦٤، سعيد)

وفى البزازية: لو جعل للكفيل أجراً لم يصح، وذكر الزيلعي أن الوديعة بالأجر مضمونة، وفى الصيرفية من أحكام الوديعة إذا استأجر المودع المودع صح. (الاشباه والنظائر: ٢/٣٩٩)

ومثلہ في تبيين الحقائق، وزاد بقولہ: والمتاع في يد (أى الأجير المشترک) غير مضمون بالهلاک... بخلاف الوديعة بأجر لأن الحفظ واجب عليہ مقصوداً ببدل (فيضمن) (تبيين الحقائق: ٥/١٣٥، ملتان)

وكذا فى مجمع الضمانات: ١/١٥١. وشرح المجلة: ٣/٢٤٢. وفتاوى حقانيہ: ٦/٣٩٩)

The other view is that if the goods are destroyed, he will not be liable to pay a penalty. Some 'ulamā' give preference to this view.

وأما من جرى العرف بأنہ يأخذ في مقابلة حفظہ أجرة يضمن، لأنہ وديعة بأجرة لكن الفتوىٰ على عدمہ، سائحاني. (رد المحتار: ٥/٦٦٤، كتاب الايداع، سعيد)

فإن شرط عليه الضمان إذا هلك يضمن في قولهم جميعاً، لأن الأجير المشترك إنما لا يضمن عند أبي حنيفة إذا لم يشترط عليه الضمان، أما إذا شرط يضمن، قال الفقيه أبو الليث، الشرط وعدم الشرط سواء، لأنه أمين، واشتراط الضمان على الأمين باطل، وبه يفتى. (خلاصة الفتاوى: ٣/١٣٧)

Imdād al-Ahkām:

When a person is paid for the safekeeping of an item, the verdict is that there will be no penalty on him if the item is destroyed.[1]

In short, if an item is destroyed while under the care of a person who is paid for its safekeeping, then there is difference of opinion. There is difference on the fatwā as well, as mentioned above. It is my view that since the owner of the item made it a point to pay for the safekeeping of the item, and also told the person that he is liable, then the fatwā of a penalty can be issued. This is especially in our times when a lackadaisical attitude is quite common.

Allāh ta'ālā knows best.

Appointing a non-Muslim as a sales representative

Question

A person appoints his Christian employee as his representative to sell alcohol or pork. Will the sale be valid? If it is valid, what is the ruling with regard to the income obtained from it? Is it permissible to do this?

Answer

Imām Abū Hanīfah rahimahullāh is of the view that the sale is valid, but makrūh tahrīmī. It is obligatory to give the income derived from the sale in charity. Imām Abū Yūsuf and Imām Muhammad rahimahullāh are of the view that the sale is invalid. It is a sin to do this and a person must abstain from it.

أمر المسلم ببيع خمر أو خنزير أو شرائهما أى وكل ذمياً أو أمر المحرم غيره أى غير المحرم ببيع صيده يعني صح ذلك عند الإمام مع أشد كراهة لأن العاقد

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[1] *Imdād al-Ahkām*, vol. 3, p. 637. Also *Īdāh an-Nawādir*, p. 172.

يتصرف بأهليته وانتقال الملك إلى الآمر أمر حكمي، وقالا: لا يصح، وهو الأظهر شرنبلالية عن البرهان، وفي رد المحتار: قوله ببيع خمر أو خنزير أى مملوكين له بأن أسلم عليهما ومات قبل أن يزيلهما وله وارث مسلم فيرثهما، قوله يعني صح ذلك. أى التوكيل وبيع الوكيل وشرائه، قوله أشد كراهة أى مع كراهة التحريم، فيجب عليه أن يخلل الخمر أو يريقها ويسيب الخنزير ولو وكله ببيعهما يجب عليه أن يتصدق بثمنهما نهر وغيره... قوله أمر حكمي أى يحكم الشرع بانتقال ما ثبت للوكيل من الملك إليه فيثبت له كثبوت الملك الجبري له بموت مورثه. (الدر المختار مع رد المحتار: ٥/٨٣، باب البيع الفاسد، سعيد)

وكذا فى حاشية الطحطاوى على الدر المختار. وفيه أيضاً وأما فى التوكيل بالبيع فعليه أن يتصدق بثمهما أفاده الحموي، قوله وانتقال الملك إلى الآمر أمر حكمي فلا يمنع بسبب الإسلام بحر. (حاشية الطحطاوى على الدر المختار: ٣/٧٦، كوئته. وكذا فى المبسوط للامام السرخسى: ١٣/١٣٨، ادارة القرآن)

قال ولو أمر ذمياً بشراء خمر أو بيعها صح. وهذا عند أبي حنيفة... لأن الوكيل أصل لنفس التصرف والموكل لحكم التصرف ألا ترى أنه يملك الخمر والخنزير بالإرث... ثم يتصدق بثمن الخمر إن باعها الوكيل له لتمكن الخبث فيه لقوله عليه السلام إن الذى حرم بيعها حرم شرائها وأكل ثمنها. (تبيين الحقائق: ٤/٥٦، ملتان)

وفى الفتاوى الهندية: ولو وكل المسلم ذمياً ببيع الخمر أو شرائه جاز في قول أبي حنيفة وقالا: لا يجوز. (الفتاوى الهندية: ٣/١١٥، فصل فى بيع المحرمات)

Allāh taʿālā knows best.

SILENT PARTNERSHIP

The salary of an employee in a mudārabah agreement

Question

Khālid and Rāshid started a business on the basis of mudārabah. Khālid did the work while Rāshid provided the capital. They employed one employee, bought a vehicle and began selling their goods in various cities. I have the following questions in this regard:

1. Who is responsible for the salary of the employee and the expenses for the vehicle?
2. Assuming the business does not make a profit, who will bear the responsibility for these two [the employee and the vehicle]?

Answer

In a mudārabah agreement, the mudārab is merely an amīn when the owner gives the goods over to him. Once he starts exercising his will over the wealth [e.g. starts selling it], then he is a representative on behalf of the owner. He is a partner in whatever profits are made. Apart from this, it is invalid to make him liable for any type of loss. If, at the time of the agreement, he was made a partner in the profit and loss, this condition will be invalid. The mudārab will not be a partner in the losses.

وحكمها أنه أمين بعد دفع المال إليه ووكيل عند العمل وشريك عند الربح. (البحر الرائق: ٧/٢٦٤، كوئته)

(وبطل الشرط) كشرط الخسران على المضارب. (رد المحتار: ٥/٦٤٨، سعيد)

In the present case, Khālid is the mudārab and Rāshid is the owner of the wealth. The vehicle and employee expenses for the running of the business will be paid from the mudārabah wealth. Khālid does not have to bear any expenses apart from his effort. If the business makes a profit, the expenses will be deducted first. After that, the balance will be distributed between the two. If the business did not make a profit, the expenses will be paid from the capital. The mudārab [Khālid] is not responsible for the expenses.

وله الإبضاع والإيداع واستئجار العمال للأعمال واستئجار المنازل لحفظ الأموال واستئجار السفن والدواب وله أن يرہن ويرتهن لها. (البحر الرائق: ٧/٢٦٤، كوئته)

(فإن ربح أخذ المالک ما أنفق من رأس المال أى ما أنفقہ المضارب فإذا استوفى رأس مالہ وفضل شيء اقتسماہ، لأن ما أنفقہ يجعل كالهالک وأشار المصنف إلى أن للمضارب أن ينفق على نفسہ من مال المضاربة فى السفر قبل الربح وإلى أنہ لو لم يظهر ربح لا شيء على المضارب. (البحر الرائق: ٧/٢٧٠، كوئته)

وسبيل النفقة أن يحتسب من الربح إن كان وإن لم يكن فهي من رأس المال. (الفتاوى الهندية: ٤/٣١٣)

على كل حال يكون الضرر والخسارة على رب المال وإذا شرط كونہ مشتركاً عليہ وعلى المضارب فلا يعتبر ذلک الشرط، لأن ہذا الشرط زائد لا يوجب قطع الشركة فى الربح ولا الجهالة فيہ فلا يكون مفسداً ويبطل الشرط. (شرح المجلة لمحمد خالد الاتاسى: ٤/٣٦٤، المادة: ١٤٢٨)

Allāh ta'ālā knows best.

Office expenses in a muḏārabah agreement

Question

Who will be responsible for the office expenses in a muḏārabah agreement?

Answer

In a muḏārabah agreement, the muḏārab is a representative on behalf of the owner in the actual work of the business. Therefore, all expenses of the muḏārabah will be paid from the capital. If the business makes a profit, the capital will be refilled. The remaining profits will be divided between the two. If the business does not make a profit, the muḏārab is not responsible to pay for anything. At the

same time, the muḏārab will not receive anything in exchange for his work.

الدر المختار:

(ويملك المضارب فى المطلقة) التي لم تقيد بمكان أو زمان أو نوع (البيع ...والشراء والتوكيل بهما والسفر براً وبحراً ...والإبضاع) أى دفع المال بضاعة... (ويملك الإيداع والرهن والارتهان والإجارة والاستئجار). وفي رد المحتار: (قوله والاستئجار) أى استئجار العمال للأعمال والمنازل لحفظ الأموال والسفن والدواب... والأصل أن التصرفات فى المضاربة ثلاثة أقسام: قسم هو من باب المضاربة، وتوابعها فيملكه من غير أن يقول له اعمل ما بدا لك كالتوكيل بالبيع والشراء والرهن والارتهان والاستئجار والإيداع والإبضاع والمسافرة. (الدر المختار مع رد المحتار: ٥/٦٤٨، كتاب المضاربة، سعيد)

وفيه أيضاً: ويأخذ المالك قدر ما أنفقه المضارب من رأس المال إن كان ثمة ربح فان استوفاه أو فضل شيء من الربح اقتسماه على الشرط لأن ما أنفقه يجعل كالهالك والهالك يصرف إلى الربح، وإن لم يظهر ربح فلا شيء عليه أى المضارب. وفي رد المحتار: قوله ويأخذ أى من الربح، قوله من رأس، وحاصل المسألة أنه لو دفع له ألفاً مثلاً فأنفق المضارب من رأس المال مائة وربح مائة يأخذ المالك الربح بدل المائة التي أنفقها المضارب ليستوفى المالك جميع رأس ماله فلو كان الربح في هذه الصورة مائتين يأخذ مائة بدل النفقة ويقتسمان المائة الثانية. (الدر المختار مع رد المحتار: ٥/٦٥٨، كتاب المضاربة، سعيد)

فتاویٰ قاضیخان:

وللمضارب أن يعمل ما هو من عادات التجار وهو... واستئجار الأجراء لحفظ المال واستئجار الدواب للحمل واستئجار المكان والسفر. (فتاویٰ قاضیخان بهامش الفتاوى الهندية: ٣/١٦٦، فصل فى ما يجوز للمضارب على المضاربة)

وللاستزادة انظر: (الفتاوى الهندية: ٤/٣١٣، باب فى نفقة المضارب. والجوهرة النيرة: ١/٣٥١. وشرح المجلة: لمحمد خالد الاتاسى: ٤/٣٦٣، المادة: ١٤٢٧)

Allāh taʿālā knows best.

When the condition of work is laid on the owner

Question

A person gave goods to someone and entered into a muḏārabah agreement with him on the condition that profits will be shared equally between the two. However, he attached this condition that the owner will also work with the muḏārab. Is a muḏārabah agreement of this nature permissible? If it is not, how can it be made permissible?

Answer

This muḏārabah agreement is invalid. A muḏārabah agreement becomes invalid when the condition of work is laid on the owner.

الدر المختار:

واشتراط عمل رب المال مع المضارب مفسد للعقد لأنه يمنع التخلية فيمنع الصحة. (الدر المختار مع رد المحتار: ٥/٦٥٤، كتاب المضاربة، سعيد. وشرح المجلة: ٤/٣٣١، المادة: ١٤١٠)

فتاویٰ قاضیخان:

المضاربة تفسد بأشياء... ومنها إذا شرط فى المضاربة عمل رب المال مع المضارب لأن ذلك يمنع التخلية بين المال والمضارب. (فتاویٰ قاضیخان بهامش الهندية: ٣/١٦١، كتاب المضاربة)

وفى الفتاوى الهندية: فإن شرطا أن يعمل رب المال مع المضارب تفسد المضاربة سواء كان المالک عاقداً أو غير عاقد. (الفتاوى الهندية: ٤/٢٨٦، كتاب المضاربة. وبدائع الصنائع: ٨٥، سعيد)

After the mudārabah agreement is invalidated, it could be corrected as follows: The agreement must be changed into a partnership. For example, if the capital is R10 000.00, the owner must give some of it to the mudārab as a loan. The latter must then accumulate it in the capital as a partnership. The profits will be shared equally between the two. Once the agreement terminates, the owner will collect the money which he loaned.

لا يشترط فى الشريكين شركة عنان كون رأس مالهما متساوياً بل يجوز كون رأس مال أحدهما أزيد من رأس مال الآخر وكل واحد منهما لا يكون مجبوراً على إدخال جميع نقده إلى رأس المال بل يجوز أن يعقد الشركة على مجموعه أو على مقدار منه فبهذه الجملة يجوز أن يكون لهما فضلة على رأس مالهما تصلح أن تكون رأس مال شركة كنقدهما مثلاً. (مجلة مع شرحها لمحمد خالد الاتاسى: ٤/٢٩٢، المادة: ١٣٦٥)

الدر المختار:

وأما عنان... ولذا تصلح عاماً وخاصاً ومطلقاً ومؤقتاً ومع التفاضل فى المال دون الربح وعكسه وببعض المال دون بعض. وفي رد المحتار: قوله ومع التفاضل فى المال دون الربح أى بأن يكون لأحدهما ألف وللآخر ألفان مثلاً واشترطا التساوي فى الربح. (الدر المختار مع رد المحتار: ٤/٣١١، ٣١٢، سعيد. وبدائع الصنائع: ٦/٦٢، سعيد)

وفى الفقه الحنفى وأدلته: شركة العنان لا تقتضى التساوى، فيصح التفاضل بينهما بالمال ويصح التساوي فى المال ويتفاضلان فى الربح لأن الربح تارة

يستحق بالمال وتارة بالعمل بدلالة المضاربة. (الفقه الحنفى وادلته، ص١٠٤، بيروت)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

Two or more people become partners in such a way that each one is not equal to the other in the capital, work, rights and profits. Each partner is merely a representative of the other; he is not his kafīl. For example, Zayd and ʿUmar get into a partnership. Zayd brings a capital of one thousand rupees and ʿUmar brings one thousand five hundred rupees. They agree to share the profits in the same proportion [as the capital]. This will be referred to as shirkat-e-ʿinān.[1]

Allāh taʿālā knows best.

When the owner works without a precondition of work

Question

No work was preconditioned on the owner, but he does it voluntarily. Is this permissible?

Answer

No work is preconditioned on the owner in a mudārabah agreement. Each one is free from the other. The owner is like a stranger. If he works voluntarily – i.e. he helps the mudārab – it will be permissible. This will not invalidate the mudārabah agreement.

الهداية:

فإن دفع شيئاً من مال المضاربة إلى رب المال بضاعة فاشترى رب المال وباع فهو على المضاربة (أى لا يفسد المضاربة)... لأن التخلية فيه قد تمت وصار التصرف حقاً للمضارب فيصلح رب المال وكيلاً عنه فى التصرف والإبضاع توكيل منه فلا يكون استرداداً بخلاف شرط العمل عليه فى الابتداء لأنه يمنع التخلية. (الهداية: ٣/٢٦٨)

[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 2, p. 23.

شرح العناية:

إن الواجب هو التخلية وقد تمت فصار التصرف حقاً للمضارب، وله أن يوكل ورب المال صالح لذلك، والإبضاع توكيل لأنه استعانة، ولما صح استعانة المضارب بالأجنبي فرب المال أولىٰ لكونه أشفق على المال فلا يكون استرداداً، بخلاف شرط العمل عليه ابتداء لأنه يمنع التخلية. فإن قيل: رب المال لا يصلح وكيلاً لأن الوكيل من يعمل في مال غيره، ورب المال لا يعمل في مال غيره بل في ماله. أجيب بأن رب المال بعد التخلية صار كالأجنبي عن المال فجاز توكيله. (شرح العناية بهامش فتح القدير: ٨/٤٧٤، دار الفكر)

بدائع الصنائع:

ولم يشترط عمله ثم استعان به على العمل أو دفع المال بضاعة جاز لأن الاستعانة لا توجب خروج المال عن يده وسواء كان المالك عاقداً أو غير عاقد. (بدائع الصنائع: ٦/٨٥، سعيد)

Allāh taʿālā knows best.

When the owner works as an employee

Question

After the muḏārabah agreement was concluded, the muḏārab employed the owner as a paid employee. Is this permissible?

Answer

It is impermissible to employ the owner as a paid employee. This will invalidate the muḏārabah agreement. Yes, he may work as an assistant.

وقد قالوا فى المضارب إذا دفع المال إلى رب المال مضاربة بالثلث فالمضاربة الثانية فاسدة والمضاربة الأولىٰ على حالها جائزة والربح بين رب المال وبين المضارب على ما شرطا فى المضاربة الأولى ولا أجر لرب المال... أما فساد المضاربة الثانية فلأن يد رب المال يد ملك ويد الملك مع يد المضارب لا

يجتمعان فلا تصلح المضاربة الثانية ويقيت المضاربة الأولى على حالها... لأن رب المال يصير معيناً للمضارب والإعانة لا توجب إخراج المال عن يده فيبقى العقد الأول ولا أجر لرب المال لأنه عمل في ملك نفسه فلا يستحق الأجر. (بدائع الصنائع: ٦/٨٥، كتاب المضاربة، سعيد. وكذا فى شرح المجلة، لمحمدالاتاسى، ٤/٣٣١، المادة: ١٤١٠)

Allāh ta'ālā knows best.

Specifying the profit in a muḏārabah agreement

Question

Ḫāmid works as a commission agent. Maḫmūd gave him two million rands to do business with it according to the Sharī'ah. He laid down the condition that he will make more than R400 000.00 profit in one year. Whatever amount is more than this will be distributed equally between the two. For example, if Ḫāmid makes a profit of R600 000.00, he will receive R100 000.00. But if he makes only R400 000.00, he will not receive anything. If any losses are suffered in the sale and purchase of shares, the owner will bear the losses. What is the ruling in this regard? Is it permissible?

Answer

The essence of this agreement is that whatever profit is made in this business, the owner will receive 20% of the capital. Any profit more than 20% will be shared equally between the owner and the muḏārab. The jurists state that all scenarios where a certain profit is specified for one of the parties, or the distribution is made after excluding a certain amount of the profit are impermissible. This is because it is possible that a profit more than the specified amount will not be made. In such a case, one party will be deprived. Furthermore, it is not permissible for either one to specify the percentage of the capital.

ومن شرطها: أن يكون الربح بينهما مشاعاً لا يستحق أحدهما دراهم مسماة من الربح، لأن شرط ذلك يقطع الشركة بينهما، ولا بد منها كما في عقد الشركة. وفي فتح القدير: لأن اشتراط دراهم مسماة لأحدهما يتمشى في صور متعددة مذكورة في معتبرات الفتاوى كالبدائع والذخيرة وغيرهما: منها أن

شرطا أن يكون لأحدهما مائة درهم من الربح أو أقل أو أكثر والباقي للآخر، ومنها: أن شرطا لأحدهما نصف الربح أو ثلثه إلا عشرة دراهم، ومنها: أن شرطا لأحدهما نصف الربح أو ثلثه ويزاد عشرة، وفي كل ذلك تفسد المضاربة بناء على أن كل واحد من الشروط المزبورة يقطع الشركة فى الربح لأنه ربما لا يربح إلا القدر المسمى أو أقل كما صرحوا به. (الهداية مع فتح القدير: ٤٤٨، ٤٤٩، كتاب المضاربة، دار الفكر)

<u>شرح المجلة:</u>

الثاني أن يكون جزءاً شايعاً قل أو كثر كالنصف أو الثلث لأن الشركة فى الربح إنما تتحقق به حتى لو شرطا لأحدهما مائة من الربح مثلاً أو مائة مع الثلث أو الثلث إلا مائة والباقي للآخر لم تجز المضاربة لأنه يؤدي إلى قطع الشركة فى الربح لجواز أن لا يربح إلا ذلك القدر. زيلعى، وحاشية للشلبي. الثالث: أن يكون المشروط للمضارب مشروطاً من الربح حتى لو شرطا شيئاً من رأس المال أو منه ومن الربح فسدت المضاربة كما فى الهندية عن المحيط. (شرح المجلة لمحمد خالد الاتاسى: ٤/٣٣٣، تحت المادة: ١٤١١)

<u>فتاوىٰ قاضيخان:</u>

المضاربة تفسد بأشياء منها إذا شرط لأحدهما من الربح ما يقطع الشركة نحو أن يجعل له دراهم مسماة مائة أو أقل أو أكثر فسدت. (فتاوىٰ قاضيخان بهامش الهندية: ٣/١٦١، كتاب المضاربة)

وللاستزادة انظر: (بدائع الصنائع: ٦/٨٦، سعيد)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

Nowadays, a new type of partnership has become common. A shop or factory owner says to his relatives or friends: "Put in so much money into the business and you will receive this percentage of profit monthly." The relative puts in that money and receives the specified

amount of profit every month. People generally consider this to be a lawful business, whereas it contains several wrongs:

1. Specifying a profit on the capital in any business is the same as giving a loan and collecting interest on it. This is explicitly haram.[1]

However, a correct and permissible form of a mudārabah agreement is for the profit between Hāmid and Mahmūd to be agreed upon on a percentage basis. For example, whatever profit is made, 80% will be for Mahmūd and 20% for Hāmid. This will be permissible.

Allāh taʿālā knows best.

When expenses are paid from the capital

Question

In a mudārabah agreement, the mudārab laid down the condition that he will collect all his house expenses from the capital. Is it permissible to lay down such a condition?

Answer

If in a mudārabah agreement the mudārab is living in his town/city where he conducts the business, then it will be impermissible for him to collect his house expenses from the capital. Laying down a condition of this nature will invalidate the agreement. Yes, if he does business in other cities, he may collect money for his boarding and lodging from the capital. It is impermissible for him to collect anything more. Once profit is made in the business, the capital will be replenished. They will then share the remainder of the profits.

شرح المجلة:

الثالث: أن يكون المشروط للمضارب مشروطاً من الربح حتى لو شرطا شيئاً من رأس المال أو منه فسدت المضاربة. (شرح المجلة لمحمد الاتاسى: ٤/٣٣٣، تحت المادة: ١٤١١. وكذا فى الفتاوى الهندية: ٤/٢٨٧)

[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 2, p. 25.

الدر المختار:

وإذا سافر ولو يوماً فطعامه وشرابه وكسوته وركوبه وكل ما يحتاجه عادة أى في عادة التجار بالمعروف في مالها وإن عمل فى المصر سواء ولد فيه أو اتخذه داراً فنفقته في ماله... ويأخذ المالک قدر ما أنفقه المضارب من رأس المال إن كان ثمة ربح فإن استوفاه أو فضل شيء من الربح اقتسماه على الشرط لأن ما أنفقه يجعل كالهالک والهالک يصرف إلى الربح. وفى رد المحتار: قوله ولو يوماً لأن العلة في وجوب النفقة حبس نفسه لأجلها فعلم أنه ليس المراد بالسفر الشرعي بل المراد أن لا يمكنه المبيت في منزله، فإن أمكن أنه يعود إليه في ليلة فهو كالمصر لا نفقة له. (الدر المختار مع رد المحتار: ٥/٦٥٧، فصل فى المتفرقات، سعيد)

الفتاوى الهندية:

إذا عمل المضارب فى المصر فليست نفقته فى المال وإن سافر فطعامه وشرابه وكسوته وركوبه معناه شراء وكراء في مال المضاربة فلو بقي شيء في يده بعد ما قدم مصره رده فى المضاربة ولو كان خروجه دون السفر إن كان بحيث يغدو ثم يروح فيبيت بأهله فهو بمنزلة السوقي فى المصر وإن كان بحيث لا يبيت بأهله فنفقته في مال المضاربة كذا فى الهداية. والنفقة هي ما يصرف إلى الحاجة الراتبة وهي الطعام والشراب والكسوة وفراش ينام عليه والركوب وعلف دابته كذا فى محيط السرخسى... وسبيل النفقة أن يحتسب من الربح إن كان وإن لم يكن فهي من رأس المال لأن النفقة جزء هالک والأصل فى الهلاک أن ينصرف أولاً إلى الربح كذا فى المحيط... فإن أنفق من مال المضاربة شيئاً على نفسه قبل أن يشترى به فإنه يستوفى رب المال رأس ماله بكماله كذا فى محيط السرخسى. (الفتاوى الهندية: ٤/٣١٢، باب فى نفقة المضارب)

وللاستزادة انظر: (بدائع الصنائع فى ترتيب الشرائع: ٦/١٠٥-١٠٧، سعيد)

Allāh taʻālā knows best.

Specifying a monthly amount for the owner

Question

Zayd gave a shop to ʻAmr so that he may conduct a business there. The entire capital and stock belong to Zayd. ʻAmr will conduct the business but Zayd laid down the condition that whether profits are made or not, he will collect R10 000.00 monthly from ʻAmr. What type of agreement can this be classified as? Is such an agreement permissible?

Answer

This agreement is called muḏārabah. It is impermissible for the owner to specify a monthly amount in a muḏārabah agreement. In fact, such a condition invalidates the agreement. Furthermore, because this amount is similar to usury, it is ẖarām to collect it.

الهداية:

ومن شرطها (المضاربة) أن يكون الربح بينهما مشاعاً لا يستحق أحدهما دراهم مسماة من الربح لأن شرط ذلك يقطع الشركة بينهما ولا بد منها كما في عقد الشركة، فإن شرط زيادة عشرة فله أجر مثله لفساده فلعله لا يربح إلا هذا القدر فيقطع الشركة فى الربح. (الهداية: ٣/٢٥٨، كتاب المضاربة)

شرح العناية:

ومن شرط المضاربة أن يكون الربح بينهما مشاعاً ومعناه أن لا يستحق أحدهما دراهم من الربح مسماة، لأن شرط ذلك ينافى الشركة المشروطة لجوازها والمنافى لشرط جواز الشيء مناف له وإذا ثبت أحد المتنافيين انتفى الآخر كما إذا ثبت الوجود انتفى العدم. (العناية شرح الهداية على هامش فتح القدير: ٨/٤٤٨، دار الفكر)

بدائع الصنائع:

ومنها أن يكون المشروط لكل واحد منهما من المضارب ورب المال من الربح جزءاً شائعاً نصفاً أو ثلثاً أو ربعاً فإن شرطا عدداً مقدراً بأن شرطا أن يكون لأحدهما مائة درہم من الربح أو أقل أو أكثر والباقى للآخر لا يجوز والمضاربة فاسدة، لأن المضاربة نوع من الشركة وہى الشركة فى الربح وہذا شرط يوجب قطع الشركة فى الربح لجواز أن لا يربح المضارب إلا ہذا القدر المذكور فيكون ذلک لأحدہما دون الآخر فلا تتحقق الشركة فلا يكون التصرف مضاربة. (بدائع الصنائع: ٦/٨٥، كتاب المضاربة، سعيد)

وللاستزادة انظر: (الكفاية شرح الهداية على ہامش فتح القدير: ٧/٤١٨، مكتبہ رشيديہ. وتبيين الحقائق: ٥/٥٤، ملتان. والاختيار لتعليل المختار: ٣/٢١. الجوہرة النيرة: ١/٣٥١. والدر المختار مع رد المحتار: ٥/٦٤٨. والفتاوى الهندية: ٤/٢٨٧. والبحر الرائق: ٧/٢٦٤، كوئٹہ. والفتاوى السراجية، ص ٥٣١. وامداد الفتاوى: ٣/٤٢. واحسن الفتاوى: ٧/٢٤٥. وجديد معاملات كے شرعی احكام: ٢/٢٥)

Allāh taʿālā knows best.

When the profit is unknown

Question

Khālid gave some money to Bakr and said: "Do business with it, and I will give you something." He did not specify an amount clearly – neither percentage-wise nor an amount. What is the ruling with regard to such an agreement?

Answer

This is a muḏārabah agreement but has been rendered invalid due to ignorance of the profits. When a muḏārabah is invalidated, the muḏārab will receive a payment which is normally paid in such situations.

شرح المجلة:

يشترط فى المضاربة كشركة العقد كون رأس المال معلوماً وتعيين حصة العاقدين من الربح جزءاً شايعاً كالنصف والثلث... وقول هذه المادة: وتعيين حصة العاقدين من الربح الخ، يتضمن اشتراط ثلاثة أمور: الأول، أن يكون نصيب كل منهما من الربح معلوماً حتى لو كان مجهولاً بأن شرط للمضارب جزءاً أو شيئاً أو ردد بين النصف والثلث مثلاً تكون فاسدة، لأن الربح هو المعقود عليه وجهالته توجب فساد العقد. (شرح المجلة، لمحمد خالد الاتاسى: ٤/٣٣٢، المادة: ١٤١١)

الهداية:

وكل شرط يوجب جهالة فى الربح يفسده لاختلال مقصوده. (الهداية: ٣/٢٥٨، كتاب المضاربة. وكذا فى الدر المختار مع رد المحتار: ٥/٦٤٨، سعيد)

الكفاية:

الربح هو المعقود عليه وجهالة المعقود عليه توجب فساد العقد. (الكفاية فى شرح الهداية على هامش فتح القدير: ٧/٤٢٠، مكتبه رشيديه)

Allāh ta'ālā knows best.

An invalid muḏārabah

فتاوى قاضيخان:

وإذا عمل المضارب فى المضاربة الفاسدة وربح كان كل الربح لرب المال وللمضارب أجر المثل تاماً لأن المضاربة إذا فسدت تبقى إجارة وفى الإجارة الفاسدة إذا عمل الأجير كان له أجر مثله تاماً. (فتاوى قاضيخان على هامش الهندية: ٣/١٦٢)

بدائع الصنائع:

وأما حكم المضاربة الفاسدة... ولا يستحق النفقة ولا الربح المسمى وإنما له أجر مثل عمله سواء كان فى المضاربة ربح أو لم يكن لأن المضاربة الفاسدة في معنى الإجارة الفاسدة والأجير... إنما يستحق أجر المثل. (بدائع الصنائع: ٦/١٠٨، سعيد)

الدر المختار:

إجارة فاسدة إن فسدت فلا ربح للمضارب حينئذٍ بل له أجر مثل عمله مطلقاً ربح أو لا بلا زيادة على المشروط خلافاً لمحمد والثلاثة. وفي رد المحتار: قوله مطلقاً هو ظاهر الرواية، قهستانى. قوله ربح أو لا وعن أبي يوسف إذا لم يربح لا أجر له وهو الصحيح لئلا تربو الفاسدة على الصحيحة سائحاني ومثله في حاشية ط عن العيني، قوله خلافاً لمحمد، فيه إشعار بأن الخلاف فيما إذا ربح وأما إذا لم يربح فأجر المثل بالغاً ما بلغ لأنه لا يمكن تقدير بنصف الربح المعدوم كما فى الفصولين لكن فى الواقعات ما قاله أبو يوسف مخصوص بما إذا ربح وما قاله محمد إن له أجر المثل بالغاً ما بلغ فيما هو أعم، قهستاني. (الدر المختار مع رد المحتار: ٥/٦٤٦، سعيد)

شرح المجلة:

استحقاق رب المال للربح بماله فيكون جميع الربح له فى المضاربة الفاسدة والمضارب بمنزلة أجيره يأخذ أجر المثل لكن لا يتجاوز المقدار المشروط حين العقد ولا يستحق أجر المثل إن لم يكن ربح. اعتباراً بالمضاربة الصحيحة لأنهما رضيا أن يكون للعامل جزء من الربح لو حصل وبالحرمان إن لم يحصل ولو أوجبنا عليه أجراً عند عدم الربح أو زيادة على المسمى إذا ربح، لربت الفاسدة على الصحيحة. وهذا قول أبي يوسف وهو الصحيح كما في

رد المحتار عن السايحاني ومثله فى الطحطاوي عن العيني. وفي حاشية أبى السعود عن ابن الفرس: وعند محمد وهو ظاهر الرواية، أنه يجب أجر المثل مطلقاً ربح أو لم يربح زاد على المسمى أو لا هذا ما نقله فى الشرنبلالية عن التبيين وشرح المجمع والخلاصة، لأنه لا يستحق المسمى لعدم الصحة ولم يرض بالعمل مجاناً، وأن أجر الأجير يجب بتسليم المنافع أو بتسليم العمل وقد وجد تسليم كل منهما هنا زيلعي. وقيل الخلاف بينهما فيما إذا ربح وأما إذا لم يربح فأجر المثل بالغاً ما بلغ. وقد علمت أن الصحيح ما مشت عليه المجلة فى هذه المادة. (شرح المجلة، لمحمد خالد الاتاسى: ٣٦٢/٤، المادة: ١٤٢٦)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

If a mudārabah agreement becomes invalid because of an invalid condition, the agreement will be concluded as follows:

All the profits which were accrued from the agreement will go to the owner of the goods. The mudārab will receive a wage which is normally given in such situations. However, the amount should not be more than the agreed-upon profits. Even if no profits were made, the mudārab will be eligible for a payment.

In short, when a mudārabah agreement becomes invalid, the mudārab has to receive a wage which is normally given. This is according to Imām Muhammad rahimahullāh – which is the zāhir ar-riwāyah. And irrespective of whether a profit is made or not. This is gauged from the texts of *al-Hidāyah* and Qādī Khān. However, Muhammad Khālid Atāsī, the annotator to *al-Majallah*, says that the view of *al-Majallah* is correct. That is, when there are no profits, the person will not receive anything.

Allāh taʿālā knows best.

When a mudārab makes an agreement with his own company

Question

Someone gave R100 000.00 to Zayd on the basis of mudārabah. He used this money to buy timber-associated products. Can Zayd sell these goods to his own company?

Answer

If Zayd is the sole owner of his company, then selling these goods to it is synonymous to selling them to himself. We learn from a text of *Fatāwā Bazzāzīyyah* that an agreement of this nature is permissible if the permission of the owner is obtained. If Zayd is one member of the company, even then there is the possibility of accusation [conflict of interests]. Therefore, he will be permitted to sell those goods provided they are sold at the market rate. He cannot sell them at a lower price. If he does, the owner of the goods will suffer loss; and a muḏārab cannot do anything which could harm the muḏārabah agreement.

الفتاوى البزازية:

الوكيل بالبيع لا يملك شراءه لنفسه لأن الواحد لا يكون مشترياً وبائعاً فيبيعه من غيره ثم يشتريه منه... وإن أمره الموكل أن يبيعه من نفسه أو أولاده الصغار أو ممن لا يقبل له شهادته فباع منهم جاز. (الفتاوى البزازية على هامش الهندية: ٥/٤٧٥، الرابع فى البيع)

الدر المختار:

لا يعقد وكيل البيع والشراء مع من ترد شهادته له للتهمة وجوازه بمثل القيمة إلا من عبد ومكاتبه إلا إذا أطلق له الموكل كـ بع ممن شئت فيجوز بيعه لهم بمثل القيمة اتفاقاً... وفى السراج: لو صرح بهم جاز إجماعاً إلا من نفسه وطفله وعبده غير المديون. وفي رد المحتار: قوله إلا من نفسه، وفى السراج: لو أمره بالبيع من هؤلاء فإنه يجوز إجماعاً إلا أن يبيعه من نفسه أو ولده الصغير أو عبده ولا دين عليه فلا يجوز قطعاً وإن صرح به الموكل، الوكيل بالبيع لا يملك شراءه لنفسه... (بزازية) كذا فى البحر، ولا يخفى ما بينهما من المخالفة، وذكر مثل ما فى السراج فى النهاية عن المبسوط، ومثل ما فى البزازية فى الذخيرة عن الطحاوي وكأن فى المسئلة قولين خلافاً لمن يدعي أنه لا مخالفة

بينهما. (الدر المختار مع رد المحتار: ٥/٥٢١، ٥٢٢، سعيد. وكذا فى البحر الرائق مع الحاشية منحة الخالق: ٧/١٦٧، كوئته)

الفتاوىٰ الهندية:

إذا اشترى المضارب أو باع ممن لا تقبل شهادته بسبب القرابة أو الزوجية أو الملک كمكاتبه والعبد المديون فإن كان البيع والشراء بمثل القيمة جاز عندهم جميعاً وإن كان مما لا يتغابن الناس بمثله لا يجوز عندهم جميعاً وإن كان مما يتغابن الناس في مثله لم يجز عند أبي حنيفة وعندهما يجوز إلا من مكاتبه وعبده المديون ہكذا فى المحيط. (الفتاوى الهندية: ٤/٢٩٤)

فتاوىٰ الشامى:

وليس له أن يعمل بما فيه ضرر ولا ما لا يعمله التجار. (فتاوى الشامى: ٥/٦٤٩، سعيد)

Ahsan al-Fatāwā:

According to one view, a mudārab can make an agreement with himself after obtaining the permission of the owner of the goods.[1]

Allāh ta'ālā knows best.

A mudārab entering into a tawliyah agreement

Question

If the mudārabah agreement is general in nature, is it permissible for the mudārab to enter into a bay' tawliyah agreement?

Answer

In a general mudārabah, a mudārab cannot do anything which could cause harm and losses, nor can he do anything which is not a common practice among the traders. Apart from this, he can do anything which is connected to the business. Therefore, he will be permitted to enter into a tawliyah agreement. In fact, there are occasions when he has to

[1] *Ahsan al-Fatāwā*, vol. 7, p. 248.

do this. For example, the value of the item may have dropped, or he wants to do a favour to the buyer because the latter has benefited the muḏārab or may benefit him in the future. However, this should not be done perpetually. It may be done occasionally when wisdom demands it.

المبسوط:

قال رحمہ اللہ تعالیٰ: وإذا دفع إلی رجل مالاً مضاربة ولم يقل اعمل فيہ برأيک فلہ أن يشتری بہ ما بدا لہ من أصناف التجارة ويبيع لأنہ نائب عن صاحب المال فی التجارة. (المبسوط للامام السرخسی: ۲۲/۳۸)

الدر المختار:

(ويملک المضارب فی المطلقة) التي لم تقيد بمكان أو زمان أو نوع (البيع) ولو فاسداً (بنقد ونسيئة متعارفة والشراء والتوكيل بهما والسفر براً وبحراً)... ويملک الإيداع والرہن والارتہان والإجارة والاستئجار... لأن كل ذلک من صنيع التجار. وفي رد المحتار: وليس لہ أن يعمل بما فيہ ضرر ولا ما لا يعملہ التجار. (الدر المختار مع رد المحتار: ۵/۶۴۹، سعيد)

حاشية الطحطاوی:

قال الصدر الشهيد: التصرفات فی المضاربة ثلاثة أقسام: قسم ہو من باب المضاربة وتوابعها فيملكها بمطلق الإيجاب وہو الإيداع والإبضاع والإجارة والاستئجار والرہن والارتہان وما أشبہ ذلک الخ. (حاشية الطحطاوی علی الدر المختار: ۳/۳۶۴، كوئٹہ)

فتاوىٰ قاضيخان:

وللمضارب أن يعمل ما هو من عادات التجارة وهو الاتضاع والإيداع واستئجار الأجراء لحفظ المال واستئجار الدواب للحمل، الخ. (فتاوىٰ قاضيخان بهامش الهندية: ٣/١٦٦)

Allāh taʿālā knows best.

The owner collecting rent for his premises

Question

Hāmid gave his shop to Mahmūd for the latter to conduct a business in it. The entire capital belongs to Hāmid. Mahmūd merely runs the business. Hāmid said to him: "I will collect R10 000.00 as a monthly rental for my shop irrespective of whether the business makes a profit or not." Is such an agreement permissible?

Answer

We learn from the statements of the jurists that a mudārab can enter into an agreement with the owner. A rental agreement is also an agreement. In this case, the owner can collect a monthly rental of R10 000.00 from the mudārab.

الدر المختار:

ولو شرى من رب المال بألف عبداً شراه رب المال بنصفه رابح بنصفه وكذا عكسه لأنه وكيله ومنه علم جواز شراء المالک من المضارب وعكسه. وفي رد المحتار: قوله وكذا عكسه وهو ما لو كان البائع المضارب والمسألة بحالها بأن شرى رب المال بألف عبداً شراه المضارب بنصفه ورأس المال ألف فأنه يرابح بنصفه. (الدر المختار مع رد المحتار: ٥/٦٥٩، سعيد)

(وكذا فى البحر الرائق: ٧/٢٧١، كوئته. والفتاوى الهندية: ٤/٢٩٢. واحسن الفتاوىٰ: ٧/٢٤٨)

Allāh taʿālā knows best.

Limited liability

Question

Is it permitted for a person to register his company under a limited liability? Is it permissible to buy shares from such a company?

A short explanation of limited liability

Limited liability means that the responsibilities of the shareholders are limited to their investment. This means that if the company suffers losses, then the most the shareholders will lose is their investment. If the debts of the company are more, the shareholders will not be required to pay more than what they invested.[1]

As per current legal and economic definition, limited liability protects shareholders of a company from having to bear more responsibility than what they invested in the company or the partnership. If the business goes into loss, the most a shareholder will lose is his capital investment. The loss will not apply to his personal effects. If the effects and possessions of the company are insufficient for paying off its debts and obligations, the creditors cannot make claims against the personal effects and possessions of the shareholders.[2]

Answer

According to the Sharīʿah, a company together with its shareholders is similar to an owner of goods and a muḏārab in a muḏārabah agreement. The shareholders in a company invest their capital and become partners in its profits. They do not do any work. The shareholders therefore fall under the category of the owners of the wealth.

Most contemporary ʿulamā' say that a partnership cannot be said to be invalid because of limited liability. Islamic jurisprudence has an astounding parallel to a limited company. It is *ʿabd ma'dhūn fī at-tijārah* (a slave who is permitted to engage in business). The master permits his slave to do business. Whatever business he does belongs to his master. If he has debts, they will be limited to the value of the slave. Anything more than that cannot be demanded from the slave nor his master. Here too the creditors may suffer some loss. This is closest to limited liability because in a company, the responsibility of the living

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[1] *Jadīd Muʿāmalāt Ke Sharʿī Aḫkām*, vol. 2, p. 42.

[2] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5, p. 175.

shareholders is ruined. Here too, in the presence of the living master, the responsibility of the creditors is ruined.[1]

Ghayr Sūdī Bank-kārī

Hadrat Maulānā Muftī Walī Hasan Sāhib rahimahullāh – the founder of Dār al-Iftā’ Jāmiʿah al-ʿUlūm al-Islāmīyyah Binnaurī Town – was of the view that the sale and purchase of shares is permissible with these prerequisites. In Pakistan, the NIT Unit has almost all its capital on the stock market. All these companies are limited liability companies. Our Dār al-Iftā’ has the fatwā of Hadrat Muftī Walī Hasan Sāhib rahimahullāh in which he states that it is permissible to invest in the NIT Unit. This fatwā contains the signature of Hadrat Maulānā Dr. ʿAbd ar-Razzāq Iskandar Sāhib in support of the fatwā.[2]

The fact of the matter is that as a company, since the liability of a bank is limited, there are no differences in the mutual rights and obligations between a mudārab and the owner of wealth in a bank. The responsibilities which the Sharīʿah imposes on the owner of wealth will remain as they are. In the same way, the responsibilities which the Sharīʿah imposes on a mudārab will remain as they are. The rule of a mudārabah agreement is that if a mudārab suffers a genuine loss – without any transgression on his part – then it falls on the owner of the wealth. The loss of the mudārab is limited to his efforts going to waste. When the bank becomes a mudārab and the depositors are the owners of the wealth, if the bank suffers a loss without it committing any transgression, the owners of the wealth will bear it as per the order of the Sharīʿah and not because the liability of the bank is limited.[3]

وما هلك من مال المضاربة يصرف إلى الربح لأنه تبع فإن زاد الهالک على الربح لم يضمن ولو فاسدة من عمله لأنه أمين. وفي رد المحتار: قوله ولو فاسدة أی سواء كانت المضاربة صحيحة أو فاسدة، وسواء كان الهلاک من عمله أو لا، قوله من عمله يعنى المسلط عليه عند التجار، وأما التعدي فيظهر أنه يضمن. (الدر المختار مع رد المحتار: ٥/٦٥٦، سعيد)

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[1] *Islām Aur Jadīd Maʿīshat Wa Tijārat*, p. 100.

[2] *Ghayr Sūdī Bank-kārī*, p. 356.

[3] *Ghayr Sūdī Bank-kārī*, p. 352.

Hadrat Muftī Muhammad Taqī ʿUthmānī Sāhib has discussed this issue in detail. He also provided answers to the objections which are made against it. For details, refer to: *Ghayr Sūdī Bank-kārī*, *Islām Aur Jadīd Maʿīshat Wa Tijārat* and *Islām Aur Jadīd Maʿāshī Masā'il.*

Objection and a reply to it

One objection remains. If the company goes bankrupt, then according to the rules of mudārabah, all profits which were made from the beginning of the agreement by the owner and the mudārab will have to be returned.

إن قسم الربح وبقيت المضاربة ثم هلک المال أو بعضه ترادا الربح ليأخذ المالک رأس المال وما فضل بينهما وإن نقص لم يضمن. (الدر المختار: ٥/٦٥٦، سعيد)

An answer to this is that a limited company must make a new agreement with its shareholders annually. If the company goes bankrupt, only the profits which were made after the new agreement will be attached.

وإن قسم الربح وفسخت المضاربة والمال في يد المضارب ثم عقداها فهلک المال لم يترادا وبقيت المضاربة لأنه عقد جديد وهي الحيلة النافعة للمضارب. وفي رد المحتار: قوله النافعة للمضارب أى لو خاف أن يسترد منه رب المال الربح بعد القسمة بسبب هلاک ما بقي من رأس المال وعلم مما مر آنفاً أنه لا يتوقف صحة الحيلة على أن يسلم المضارب رأس المال إلى رب المال وتقييد الزيلعي به اتفاقي كما نبه عليه أبو السعود. (الدر المختار مع رد المحتار: ٥/٦٥٦، سعيد)

To sum up, it is permissible to register a limited liability and to buy its shares while observing the previously mentioned conditions.

Allāh taʿālā knows best.

Specifying an additional amount for the working partner

Question

There are two partners in a business. That is, the capital of both is combined. One of them does the work while the other does not. A

larger share is specified for the one who does the work. Is this permissible? Is this a partnership or muḏārabah?

Answer

This is essentially a muḏārabah agreement in which the worker receives an additional percentage, e.g. 80%. For example, Zayd puts in R100 000.00 and ʿUmar puts in R100 000.00. Since ʿUmar does the work, 80% is specified for him and 20% for ʿUmar. This means that 50% of the profits are for ʿUmar from his goods. From the remaining 50%, 30% is for ʿUmar for his work, and 20% for Zayd because of his goods. The partnership will be partnership in profits, which is actually muḏārabah.

قال ابن عابدين رحمہ اللہ تعالیٰ فی الشرکۃ: وفی النہر اعلم أنہما إذا شرطا العمل علیہما أن تساویا مالاً وتفاوتا ربحاً جاز عند علمائنا الثلاثۃ رحمہم اللہ تعالیٰ خلافاً لزفر رحمہ اللہ تعالیٰ، والربح بینہما علی ما شرطا وإن عمل أحدہما فقط، وإن شرطاہ علی أحدہما، فإن شرطا الربح بینہما بقدر رأس مالہما جاز، ویکون مال الذي لا عمل لہ بضاعۃ عند العامل لہ ربحہ وعلیہ وضیعتہ وإن شرطا الربح للعامل أکثر من رأس مالہ جاز أیضاً علی الشرط ویکون مال الدافع عند العامل مضاربۃ، ولو شرطا الربح للدافع أکثر من رأس مالہ لا یصح الشرط ویکون مال الدافع عند العامل بضاعۃ لکل واحد منہما ربح مالہ والوضیعۃ بینہما علی قدر رأس مالہما أبداً ہذا حاصل ما فی العنایۃ. ما فی النہر، قلت: وحاصل ذلک کلہ أنہ إذا تفاضلا فی الربح فإن شرطا العمل علیہما سویۃ جاز ولو تبرع أحدہما بالعمل وکذا لو شرطا العمل علی أحدہما وکان الربح للعامل بقدر رأس مالہ أو أکثر ولو کان الأکثر لغیر العامل أو لأقلہما عملاً لا یصح ولہ ربح مالہ فقط، وہذا إذا کان العمل مشروطاً. الخ. (رد المحتار: ٤/٣١٢، کتاب الشرکۃ، سعید)

تقريرات الرافعي:

(قوله وإن شرطاه على أحدهما فإن شرطا الربح بينهما بقدر الخ) فى الدرر من كتاب المضاربة ما نصه: والثالث أى من شروط المضاربة تسليمه إلى المضارب حتى لا يبقى لرب المال فيه يد لأن المال يكون أمانة عنده فلا يتم إلا بالتسليم كالوديعة بخلاف الشركة لأن المال فى المضاربة من أحد الجانبين والعمل من الجانب الآخر فلا بد أن يخلص المال للعامل ليتمكن من التصرف فيه، وأما العمل فى الشركة فمن الجانبين فلو شرط خلوص اليد لأحدهما لم تنعقد الشركة لانتفاء شرطها وهو العمل منهما، فظاهر ما فيها ينافى ما نقله المحشي ويقال في دفع المنافاة إن شرط العمل منهما شرط لتحقيق الشركة وإذا شرط على أحدهما تكون مضاربة أو بضاعة على ما ذكره المحشي تأمل، ثم أنه لا حاجة... إلى قوله وتخصيص العمل بأحدهما يخرج المسألة عن أن تكون من مفردات مسائل الشركة بل هي حينئذٍ بضاعة إن شرط العمل على أحدهما مع التساوي فى الربح ومضاربة إن شرط الفضل للعامل. (التحرير المختار على هامش رد المحتار: ٤/٧٠، سعيد)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

In a partnership, there has to be work from both partners. This is a precondition and it is not found here. This is why it is not a partnership but a mudārabah. If no condition is laid down for the owner of the goods to put down goods, there is no objection to it. If it is preconditioned, it will still be permissible because of the affinity between a partnership (shirkah) and mudārabah. In such a case, mudārabah is the basis and shirkah is subordinate. This is why the condition of work from both parties has been removed. In the same way, together with the condition of work from both partners, it is also permissible to have differences in the share of profits because this is preferred over the case where shirkah is the basis and mudārabah is

the subordinate. This is why laying down the condition of work from both partners is not harmful.[1]

Further reading: *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5, p. 47.

Allāh taʿālā knows best.

Giving money to a company on the basis of mudārabah

Question

A person gave a certain amount of money to a company for the purchase of a tank. The company buys the tank and gives it over to its manager who then hires out this tank together with other tanks. The acquired profits are then distributed among themselves as follows: 15% for the manager, 5% for the company, and the remaining profits are distributed among the tank-owners. Does the Sharīʿah permit an agreement of this nature?

Answer

This is a mudārabah agreement. The owners of the tanks are classified as rabb al-māl (owners of the wealth). The company, its manager, etc. are classified as mudārab. The mudārabah goods are mixed with goods belonging to others and business is done with them through the explicit permission of the rabb al-māl or by saying: "Do as per your opinion." This is permissible. The profits are specified on a percentage basis. This mudārabah agreement is correct and permissible.

الفتاوى الهندية:

الأصل أن ما يفعله المضارب ثلاثة أنواع نوع يملكه بمطلق المضاربة وهو ما يكون من باب المضاربة وتوابعها ومن جملته التوكيل بالبيع والشراء للحاجة... ونوع لا يملكه بمطلق العقد ويملكه إذا قيل له اعمل برأيك وهو ما يحتمل أن يلحق به فيلحق به عند وجود الدلالة وذلك مثل دفع المال مضاربة أو شركة إلى غيره وخلط مال المضاربة بماله أو بمال غيره. (الفتاوى الهندية: ٤/٢٩١، باب فى ما يملك المضار بمن التصرفات)

[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 2, p. 31.

الدر المختار:

ولا يملك المضاربة والشركة والخلط بمال نفسه إلا بإذن. وفي رد المحتار: قوله والخلط بمال نفسه أى أو غيره كما فى البحر إلا أن تكون معاملة التجار في تلك البلاد أن المضاربين يخلطون، ولا ينهونهم فإن غلب التعارف بينهم في مثله وجب أن لا يضمن كما فى التاتارخانية. (الدر المختار مع رد المحتار: ٥/٦٤٩، كتاب المضاربة، سعيد)

فتاوىٰ قاضيخان:

وللمضارب أن يعمل ما هو من عادات التجار وهو... واستئجار الأجراء لحفظ المال واستئجار الدواب للحمل واستئجار المكان والسفر. (فتاوىٰ قاضيخان بهامش الفتاوى الهندية: ٣/١٦٦، فصل فى ما يجوز للمضارب على المضاربة). (وكذا فى البحر الرائق: ٧/٢٦٤، كوئته)

شرح المجلة:

الثاني أن يكون جزءاً شايعاً قل أو كثر كالنصف أو الثلث لأن الشركة فى الربح إنما تتحقق به حتى لو شرطا لأحدهما مائة من الربح مثلاً أو مائة مع الثلث أو الثلث إلا مائة والباقي للآخر لم تجز المضاربة لأنه يؤدي إلى قطع الشركة فى الربح لجواز أن لا يربح إلا ذلك القدر. زيلعى، وحاشية للشلبي. (شرح المجلة لمحمد خالد الاتاسى: ٤/٣٣٣، تحت المادة: ١٤١١)

Further reading: *Jadīd Muʿāmalāt Ke Sharʿī Ah̲kām*, vol. 2, p. 23.

Nowadays, it is common and well-known that other goods are mixed with mud̲ārabah goods. There is no need to obtain permission to do this. This is clear from the text of Shāmī rah̲imahullāh.

Allāh taʿālā knows best.

Terminating a mudārabah

Question

Zayd and ʿUmar started a mudārabah in 2002. Zayd's share (as the owner of the goods) was specified as 25% and ʿAmr's share (as the mudārab) was specified as 75%. In 2007, the mudārab gave only three thousand as profit to the owner, and asked him to take back his capital. When he was asked for the remaining profits, the mudārab said that he will pay them in instalments over a period of time. My question is: Has the mudārabah terminated? Is it correct to collect the remaining profits later on?

Answer

A mudārabah agreement can be terminated after informing the owner. If the mudārab does not have the money at present, it is permissible to collect the remaining profits later on. However, if the mudārab has the money, it is not permissible for him to delay in paying it.

بدائع الصنائع:

وأما صفة هذا العقد فهو أنه عقد غير لازم ولكل واحد منهما أعني رب المال والمضارب الفسخ لكن عند وجود شرطه وهو علم صاحبه لما ذكرنا في كتاب الشركة ويشترط أيضاً أن يكون رأس المال عيناً وقت الفسخ دراهم أو دنانير حتى لو نهى رب المال المضارب عن التصرف ورأس المال عروض وقت النهى لم يصح نهيه. (بدائع الصنائع: ٦/١٠٩، سعيد)

بداية المجتهد:

أجمع العلماء على أن اللزوم ليس من موجبات عقد القراض، وان لكل واحد منهما فسخه ما لم يشرع العامل فى القراض، واختلفوا إذا شرع العامل، فقال مالك: هو لازم... وقال الشافعى وأبو حنيفة: لكل واحد منهم الفسخ إذا شاء. (بداية المجتهد: ٢/١٨١، القول فى احكام القراض، دار نشر الكتب)

Fatāwā Haqqānīyyah:

Either of the two parties in a mudārabah agreement can terminate the agreement as and when he wants. However, it is necessary for one to

inform the other. The termination will be correct only when the wealth is available in the form of cash. If the wealth is in the form of goods, the mudārab will be given the opportunity to sell them so that the original profit can be ascertained – the reason for which the agreement was made.[1]

Further reading: *Islāmī Fiqh*, vol. 2, p. 397.

Allāh taʿālā knows best.

Specifying a wage for the mudārab

Question

A person works in a shop on the basis of mudārabah. He receives 25% of the profits while the owner takes 75%. Alternatively, he is a partner with someone. Can the partner or the mudārab receive a wage in addition to his share? Giving a wage is quite common in our area.

Answer

The mudārab will receive a percentage of the profits in return for his work. He cannot take a monthly specified salary. Yes, if the mudārab works as a paid employee, he may take a wage. If, together with the salary, an amount is reduced from the profits and given to him; then this is also permissible. Whether a partner can become a hireling or not is a contentious issue among the ʿulamā'. Most jurists say that it is not permissible. However, Hadrat Muftī Rashīd Ahmad Ludhyānwī Sāhib rahimahullāh has permitted it.

رد المحتار:

لا أجر للشريک فی العمل بالمشترک. (رد المحتار: ٤/٣٢٦، سعيد)

النتف فی الفتاویٰ:

لو كان طعام بين رجلين فقال أحد هما لصاحبه: احمله إلى الموضع كذا، ولک في نصيبي من الأجر كذا، أو قال: اطحنه ولک في نصيبي كذا من الأجر، جاز ذلک في قول زفر ومحمد بن صاحب، ولا يجوز في قول أبي حنيفة وأبي يوسف

[1] *Fatāwā Haqqānīyyah*, vol. 6, p. 354.

ومحمد. (النتف فی الفتاوی: ص ۳٤۹، کتاب الاجارة، اجارة الشریک شریکہ، سعید)

After quoting the texts of the jurists, Muftī Rashīd Sāhib writes:

The following points are established from the previously-quoted texts:

1. The impermissibility of keeping a partner as an employee is not proven from any text of the Sharīʿah.
2. There is no narration in this regard from Hadrat Imām [Abū Hanīfah] Sāhib rahimahullāh.
3. It is a view of Imām Muhammad rahimahullāh but no reason is reported in this regard.
4. The reasons provided by some scholars are questionable by other scholars.
5. ʿAllāmah Saʿdī rahimahullāh has classified it as ijārah al-mushāʿ.
6. Ijārah al-mushāʿ is unanimously permissible by the four Imāms, but Imām Abū Hanīfah rahimahullāh says that it is impermissible for a non-partner.
7. Like ijārah al-mushāʿ, the three Imāms concur on the permissibility of employing a partner.
8. Despite the prohibition of qafīz at-tahhān being established by a Sharīʿah text, some jurists permit it on the basis of common practice. However, other jurists did not permit it because the common practice is specific to those countries; and it is impermissible to cast aside a Sharīʿah text for a specific common practice.
9. General common practice is a pre-requisite for leaving aside a text of the Sharīʿah. However, even a specific practice will be sufficient reason to leave aside a text of the madh-hab.
10. As regards the Hanafī madh-hab, preference is given to the statements of Imām Abū Yūsuf and Imām Muhammad rahimahumallāh as regards injunctions based on common practice.
11. A text of the madh-hab can be left aside for the sake of a specific common practice. As for keeping partners of a company as employees, this is a general common practice.

Therefore, there is more reason to leave aside the text of the madh-hab. This is especially so when this text is not of Imām Sā<u>h</u>ib's but a view of Imām Mu<u>h</u>ammad ra<u>h</u>imahullāh, due to which common practice is given preference.[1]

رسائل ابن عابدين:

قال ابن عابدين: فهذه النقول ونحوها دالة على اعتبار العرف الخاص وإن خالف المنصوص عليه في كتب المذهب ما لم يخالف النص الشرعي... أقول: وبما قررناه تبين لك أن ما تقدم عن الأشباه من المذهب عدم اعتبار العرف الخاص إنما هو فيما إذا عارض النص الشرعي وأما العرف الخاص إذا عارض النص المذهبي المنقول عن صاحب المذهب فهو معتبر كما مشى عليه أصحاب المتون والشروح والفتاوى... ليس للمفتي ولا القاضي أن يحكما بظاهر الرواية ويتركا العرف. (رسائل ابن عابدين: ٢/١٣٣)

وفيه أيضاً: فهذا كله وأمثاله دلائل واضحة على أن المفتي ليس له الجمود على المنقول في كتب ظاهر الرواية من غير مراعاة الزمان وأهله وإلا يضيع حقوقاً كثيرة ويكون ضرره أعظم من نفعه. (رسائل ابن عابدين: ٢/١٣١)

وفيه أيضاً: ولهذا ترى مشايخ المذهب خالفوا ما نص عليه المجتهد في مواضع كثيرة بناها على ما كان في زمنه لعلمهم بأنه لو كان في زمنهم لقال بما قالوا به أخذاً من قواعد مذهبه. (رسائل ابن عابدين: ٢/١٢٥، مكتبه محمدويه، كوئته)

العرف والعادة:

بيع الثمار على الأشجار... وظاهر مذهب الحنفية بطلانه، وبه قال شمس الأئمة السرخسي، وأفتى الحلواني وأبو بكر بن الفضل من مشايخ المذهب بالجواز...

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[1] *A<u>h</u>san al-Fatāwā*, vol. 7, p. 328.

والحلواني وابن الفضل عدلا عن ظاهر المذهب للعرف، قال ابن الفضل: استحسن فيه لتعامل الناس، فإنهم تعاملوا ببيع ثمار الكرم بهذه الصفة، ولهم في ذلك عادة ظاهرة، وفي نزع الناس عن عاداتهم حرج، وكون هذا من بيع المعدوم المنهى عنه وتصريح ظاهر المذهب ببطلانه، لا يمنع من صحة ما أفتوا به، لأن العرف كما علمنا يخصص الأدلة ويعدل به عن ظاهر المذهب. (العرف والعادة، ص ١٧٢، ١٧٣)

To sum up, the easiest option should be chosen to provide ease to people in these transactions. This is on the condition that the limits of the Sharīʿah are not transgressed. Since it is common practice to pay a salary to an employed partner, there is room for its permissibility as per the statement of Hadrat Muftī Rashīd Sāhib rahimahullāh.

Allāh taʿālā knows best.

Terminating a mudārabah when there are no profits

Question

Two persons entered into a mudārabah agreement. One will provide the goods while the other will do the work. A plot of land was purchased for R100 000.00 with a view to constructing some shops on it. The profits derived from them will be divided equally between the two. The construction work will continue for about a year. Five months after the agreement, the owner of the goods wants to terminate it. During this period, about R30 000.00 were spent on the construction from the capital wealth. My question is, if the mudārab keeps the land for himself, how much money will he return to the owner? Secondly, no profit was made thus far, so what will the mudārab receive?

Answer

Each person has the right to terminate the mudārabah agreement by informing the other. Once a decision is taken to terminate it, it is necessary for the mudārab to return the capital amount to the owner. In this case, the mudārab must either sell the land to someone else or buy it himself, and return the capital amount. Since no profits were made thus far, the mudārab will not receive anything.

وأما صفة ہذا العقد فہو أنہ عقد غير لازم ولكل واحد منہما أعني رب المال والمضارب الفسخ لكن عند وجود شرطہ وہو علم صاحبہ لما ذكرنا في كتاب الشركة ويشترط أيضاً أن يكون رأس المال عيناً وقت الفسخ دراہم أو دنانير حتى لو نہى رب المال المضارب عن التصرف ورأس المال عروض وقت النہى لم يصح نہيہ، ولہ أن يبيعہا لأنہ يحتاج إلى بيعہا بالدراہم والدنانير ليظہر الربح فكان النہى والفسخ إبطالاً لحقہ فى التصرف فلا يملك ذلك. (بدائع الصنائع: ٦/١٠٩، سعيد)

وفيہ أيضاً: والثاني ما يستحقہ المضارب بعملہ فى المضاربة الصحيحة ہو الربح المسمى إن كان فى المضاربة ربح... فإن لم يكن فيہا ربح فلا شيء للمضارب لأن الشرط قد صح فلا يستحق إلا ما شرط وہو الربح ولم يوجد. (بدائع الصنائع: ٦/١٠٧، سعيد)

وفيہ أيضاً: ويجوز شراء رب المال من المضارب وشراء المضارب من رب المال، وإن لم يكن فى المضاربة ربح في قول أصحابنا الثلاثة. (بدائع الصنائع: ٦/١٠١، سعيد)

If the mudārabah agreement has been concluded and the mudārab did not start his work as yet, then all the Imāms concur and say that each of the two parties has the right to terminate the agreement. But if the mudārab has started the work, there is difference of opinion as to whether they have the right to terminate the agreement or not. Imām Mālik rahimahullāh says that neither of the two has the right to terminate it. Imām Abū Hanīfah and Imām Shāfi'ī rahimahumallāh say that each of the two always has the right to terminate it whenever he wants. However, it is necessary for one to inform the other of the termination.

If the value of the land which was bought with the capital amount has increased, the profit in favour of the mudārab will be established. Now the capital amount will be separated from the amount they receive after selling it, and the profit will be divided between the two.

(ولا يعتق عليہ) أى المضارب (إن كان فى المال ربح)... (فإن فعل... وقع الشراء لنفسہ) وإن لم يکن ربح كما ذكرنا (صح) [أى الشرئ] للمضاربة، فإن ظهرالربح بزيادة قيمتہ [أى العبد] بعد الشراء عتق عليہ حظہ، ولم يضمن نصيب المالک لعتقہ لا بصنعہ. (الدر المختار: ٥/٦٥١، سعيد)

Allāh ta'ālā knows best.

A mudārab having to pay for losses

Question

Hāmid and Mahmūd started a business. The agreement stated that Mahmūd will give R500 000.00 as the capital while Hāmid will conduct the business. From the profits, Mahmūd will take 75% and Hāmid will receive 25%. If any loss is suffered, it will be borne by Mahmūd. They ran the business according to the agreement for two years. Some time ago, few people bought goods from Hāmid and disappeared without paying for the goods. Mahmūd is now asking Hāmid to pay for the loss whereas this is different to what the agreement states. Hāmid had been conducting the business correctly as much as he could. He did not fall short in any way. What is the ruling of the Sharī'ah?

Answer

In a mudārabah agreement, the goods which the mudārab receives are classified as an amānah (trust). He is also a wakīl (representative) as regards the will which he exercises over the goods. In other words, he is a representative on behalf of the one who provided the goods. Bearing in mind that he is an entrusted person, it is essential for him to protect the goods. If an incidental loss occurs in the capital or gets destroyed, the mudārab is not responsible for it. However, if there is proof that he wittingly destroyed the goods, he will be liable. Furthermore, he will also be liable if he acts against the conditions laid down by the owner.

Bearing in mind the above ruling of the Sharī'ah, the ruling with regard to the present situation is that the loss will be first recovered from the profits. If no profit was made or the loss is more than the profit, and Hāmid displayed no shortcoming in the business, then Hāmid will not be responsible for the loss. Instead, Mahmūd will bear the loss.

If the precondition of loss in the agreement was applied to the mudārab, he will still not be liable for it. Also, the mudārabah will not be invalidated. Rather, the condition will be invalidated.

(ويملک المضارب فی المطلقة) التي لم تقيد بمكان أو زمان أو نوع (البيع)... (بنقد ونسيئة متعارفة). وفي رد المحتار: قوله بنقد ونسيئة ولو اختلفا فيهما فالقول للمضارب فی المضاربة. (الدر المختار مع رد المحتار: ٥/٦٤٨، كتاب المضاربة، سعيد)

<u>الهداية:</u>

وما هلک من مال المضاربة فهو من الربح، دون راس المال، فإذا زاد الهالک على الربح فلا ضمان على المضارب لأنه أمين. (الهداية: ٣/٢٦٦)

(وكذا فی الدر المختار مع رد المحتار: ٥/٦٥٦، سعيد)

<u>الهداية:</u>

وغير ذلک من الشروط الفاسدة لا يفسدها ويبطل الشرط كشرط الوضيعة على المضارب. (الهداية: ٣/٢٥٨. وكذا فی الدر المختار: ٥/٦٤٨)

Jadīd Muʿāmalāt Ke Sharʿī Ahkām:

The mudārabah agreement in the present case is correct, but the full loss will be borne solely by the one who provided the capital. The mudārab will not be liable for anything in this regard.

وفي رد المحتار: قوله بطل الشرط كشرط الخسران على المضارب.[1]

Allāh taʿālā knows best.

The method of acquiring profits according to Islamic principles

<u>Question</u>

A bank or company accepts money according to Islamic principles from people, acquires profits from their money, and then distributes

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[1] *Jadīd Muʿāmalāt Ke Sharʿī Ahkām*, vol. 2, p. 33.

the profits among them. What is the correct procedure for doing all this?

<u>Answer</u>

The bank or company must accept the money from people on the basis of muḏārabah. Those who give their money will be like the owner of the wealth, while the bank or company will be like a muḏārab provided it engages in business. And the profits will be distributed among them according to a pre-agreed percentage. For example, the owner shall receive 40% while the muḏārab (bank or company) will receive 60%. Obviously, the date of the deposit and withdrawal of monies is not the same. The calculation will therefore be done daily, and the profit will be distributed on a daily product basis. Whatever number of days a person deposits his money in the bank, he will receive the average amount of profits for those days.

المضاربة عقد يقع على الشركة بمال من أحد الجانبين ومراده الشركة فى الربح وہو يستحق بالمال من أحد الجانبين والعمل من الجانب الآخر ولا مضاربة بدونها. (الهداية: ٣/٢٥٧، كتاب المضاربة)

It is essential to observe the following fundamental principles of partnership and muḏārabah for the sake of acquiring profits:

1. It is not permissible to specify the profits [return of investment] in proportion to the capital. The correct Sharī'ah procedure for specifying the profit is to specify the percentage which a person will receive from the real profit which is made.

2. The proportion of profit can be anything provided it is agreed upon through mutual acceptance. It is not necessary to distribute the profit according to the capital. However, the profit of the partner who lays down the condition that he will not do the work cannot be more in proportion to his capital.

3. Different conditions can be applied to the different partners as regards the profit, but it is not permissible to do this when a loss is suffered. The loss will always be in proportion to the capital. The jurists express this principle as follows:

الربح على ما اصطلحوا عليه، والوضيعة بقدر رأس المال.

Further reading: *Islām Aur Jadīd Ma'īshat Wa Tijārat; Islāmī Fiqh* (vol. 2); *Islām Aur Jadīd Ma'āshī Masā'il* (vol. 5)

Objection and answer

One objection to the "daily calculation" is that distribution of profits in this way is an immediate distribution and not a genuine distribution of profits. There is the possibility of a portion of Zayd's real profit going to ʿUmar.

An answer to this is that the monies of the partners get mixed up. Therefore, when distributing the profit, the real profit is not considered. Rather, the accumulated profit from the accumulated capital is distributed. If not, it is also possible that no profit at all was made from Zayd's capital while it was made solely from ʿUmar's. Therefore, the Sharīʿah does not require a real profit; a close profit is sufficient.

Further reading: *Islām Aur Jadīd Maʿīshat Wa Tijārat* by Hadrat Muftī Taqī ʿUthmānī Sāhib.

Allāh taʿālā knows best.

When a mudārabah is restricted to a time

Question

In a mudārabah agreement, a person said: "You may invest your money for as long as you want, but the minimum has to be five years and the maximum will be fifteen years." Is it permissible to lay down such a condition?

Answer

It is permissible to restrict a mudārabah agreement to a time period and to lay down a condition of this nature. However, we learn from the statements of the jurists that it is incorrect to lay down a minimum period. A person has to have the choice of terminating the agreement before that time.

وإن وقت للمضاربة وقتاً بعينه يتقيد به حتى يبطل العقد بمضيه. (الفتاوى الهندية: ٤/٢٩٨)

(وكذا فى شرح المجلة: ٤/٣٥٥، المادة : ١٤٢٠)

Islāmī Fiqh:

In the case where a time is specified, each party has the right to terminate the agreement the moment the time expires.[1]

Islām Aur Jadīd Maʿāshī Masā'il:

According to Hanafī and Hambalī jurisprudence, a mudārabah agreement can be confined to a specified time, e.g. one year, six months, etc. after which, the mudārabah will terminate without any notice...Can the two parties specify a minimum period before which the mudārabah cannot be terminated? One principle is generally mentioned. From it we learn that a time period of this nature cannot be specified, and that each party has the right to terminate the agreement whenever it wants.

This unrestricted right of terminating the mudārabah agreement by either party could create some challenges in the present conditions. Most businesses require some time to demonstrate their successes. They require complex and focussed mental efforts. If the owner of the wealth were to terminate the mudārabah right at the beginning, it would cause a major difficulty for this objective. The mudārab will be especially distressed because he could not earn anything despite all his efforts. Therefore, if at the time of entering the mudārabah agreement, both parties agree not to terminate the agreement before a specified time – except for certain special situations – then this does not appear to be in conflict with any principle of the Sharīʿah. This is especially so in the light of the following Hadīth:

> المسلمون على شروطهم إلا شرطاً أحل حراماً أو حرم حلالاً. (رواه الترمذى وصححه، برقم: ١٣٥٢، فى باب ما يذكر عن رسول الله صلى الله عليه وسلم فى الصلح بين الناس)
>
> The mutual preconditions of Muslims will be maintained except for a condition which legalizes the unlawful and prohibits the lawful.[2]

Allāh taʿālā knows best.

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[1] *Islāmī Fiqh*, vol. 2, p. 397.

[2] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5, pp. 46-47.

Few issues related to mu<u>d</u>ārabah

I am taking the courage to ask a few questions related to mu<u>d</u>ārabah. Kindly bless me with answers.

Question one:

If the owner lays down the condition on the mu<u>d</u>ārab that he must only engage in cash transactions, can he do business on credit?

Answer:

He cannot.

ولو دفعه إليه مضاربة على أن يشتري بالنقد و يبيع فليس له أن يشتري إلا بالنقد لأن هذا تقييد مفيد في حق رب المال. (المبسوط للامام السرخسى: ٢٢/٤٤، باب ما يجوز للمضارب وما لا يجوز)

Allāh taʽālā knows best.

Question two:

Is it permissible to enter into a mu<u>d</u>ārabah agreement with a non-Muslim?

Answer:

This is a transaction and sameness in religion is not necessary when engaging in transactions. Rasūlullāh <u>s</u>allallāhu ʽalayhi wa sallam had business dealings with non-Muslims.

وإسلامه ليس بشرط أصلاً فتجوز الإجارة والاستئجار من المسلم والذمي والحربي المستامن لأن هذا من عقود المعاوضات فيملكه المسلم والكافرجميعاً كالبياعات... الخ. (بدائع الصنائع: ٤/١٧٦، كتاب الاجارة، سعيد)

Allāh taʽālā knows best.

Question three:

I gave R100 000.00 to a mu<u>d</u>ārab to conduct a business. He himself is a businessman and takes goods/capital from other people as mu<u>d</u>ārabah. Is this correct? What I mean is that is it correct for him to mix the goods/capital of different people?

Answer:

He can do this if he obtains the permission of the owner of the goods. If he does not permit him explicitly, a permission on the basis of common practice will suffice because societal norms and common practices apply in this case.

ولا يملك المضاربة والشركة والخلط بمال نفسه إلا بإذن. وفي رد المحتار: قوله والخلط بمال نفسه أى أو غيره كما فى البحر إلا أن تكون معاملة التجار في تلك البلاد أن المضاربين يخلطون، ولا ينهونهم فإن غلب التعارف بينهم في مثله وجب أن لا يضمن كما فى التاتارخانية. (الدر المختار مع رد المحتار: ٥/٦٤٩، كتاب المضاربة، سعيد)

Question four:

I live in Lenasia and my business is in Johannesburg. I am a mudārab on behalf of Zayd. I have to travel daily to Johannesburg which is about 25kms away. Can I collect an amount of money for the vehicle expenses?

Answer:

When a mudārab leaves the city in which he resides for the sake of doing the work of mudārabah, he can collect for boarding and lodging as per societal norms and practices.

We learn from the statements of the jurists that if the person can return to his house by nightfall, it will not be necessary to pay his expenses from the mudārabah wealth. If his journey is such that it is difficult for him to return home by nightfall, he can pay for his expenses from the mudārabah wealth.

Refer to: *Badā'iʿ as-Sanā'iʿ*, vol. 6, pp. 105-106; *al-Fatāwā al-Hindīyyah*, vol. 4, p. 312; *Fatāwā ash-Shāmī*, vol. 5, p. 657.

This is based on societal norms. In our society, the afternoon meal is normally provided by the owner when a person goes out of the city to work, even if he returns home by the evening. Furthermore, when the employee uses his own car, the fuel is paid for from the business. In fact, in many places the owner provides a company vehicle. This is why we say that these issues revolve around societal norms and practices.

Allāh taʿālā knows best.

Mudārabah with a telephone company

Question

A person received a license from the government to run a telephone company. He paid about $20 000.00 as fees. The man spent a lot of money and energy in obtaining this license. He started a company to run the business. He requires more money to purchase machines. He asks ten persons to give him $15 000.00 on the condition that whatever profit the business makes, he will give them a specified percentage. After one year, the capital with the profit will be paid to them. He also laid down the condition that none of the ten will interfere in the business in any way. The man will run the business as he wants.

a) Is it permissible to invest one's money for one year in a company, and to take back the capital investment with the profit after one year?

b) Will the capital investment be guaranteed?

c) Is an agreement of this nature permissible?

Answer

a) The above scenario is one of mudārabah and it is permissible. Mudārabah refers to one person providing the capital while the other doing the work. The profit will be divided on a percentage basis as per the conditions laid down. It is not permissible for either of the party to specify an amount. Similarly, it is not permissible to take a percentage of the capital because this falls under usury.

المضاربة... شرعاً عقد شركة فى الربح بمال من جانب رب المال وعمل من جانب المضارب. وفي رد المحتار: قوله من جانب المضارب قيد به لأنه لو اشترط رب المال أن يعمل مع المضارب فسدت. (الدر المختار مع رد المحتار: ٥/٦٤٥، كتاب المضاربة، سعيد)

وفيه أيضاً: ومن شروطها: كون نصيب المضارب من الربح حتى لو شرط له من رأس المال أو منه ومن الربح فسدت، وفى الجلالية: كل شرط يوجب جهالة فى الربح أو يقطع الشركة فيه يفسدها وإلا بطل الشرط وصح العقد اعتباراً بالوكالة... (ويملك المضارب فى المطلقة) التي لم تقيد بمكان أو زمان أو نوع

(البيع)... (بنقد ونسيئة متعارفة والشراء والتوكيل بهما والسفر براً وبحراً).
(الدر المختار: ٥/٦٤٨، سعيد)

b) A mu<u>d</u>ārabah for one year is permissible. It is referred to as mu<u>d</u>ārabah muwaqqatah. Details in this regard were given previously.

c) The capital will not be guaranteed. Rather, the mu<u>d</u>ārab will work with it as an amīn (entrusted person) provided no transgression is committed. If a loss is suffered without any transgression on the part of the mu<u>d</u>ārab, the loss will first be recovered from the profit. If the profit is insufficient, it will be recovered from the capital.

قوله بطل الشرط كشرط الخسران على المضارب. (فتاوى الشامى: ٥/٦٤٨، سعيد)

وفى الدر المختار: وما هلک من مال المضاربة يصرف إلى الربح لأنه تبع فإن زاد الهالک على الربح لم يضمن ولو فاسدة من عمله لأنه أمين، وفي رد المحتار: قوله ولو فاسدة أى سواء كانت المضاربة صحيحة أو فاسدة، وسواء كان الهلاک من عمله أو لا، ح (قوله من عمله) يعنى المسلط عليه عند التجار، وأما التعدي فيظهر أنه يضمن سائحاني. (الدر المختار مع رد المحتار: ٥/٦٥٦، سعيد)

Allāh ta'ālā knows best.

When an owner includes his son in a mu<u>d</u>ārabah agreement

<u>Question</u>

Zayd gave R100 000.00 as mu<u>d</u>ārabah to 'Umar. They agreed that 30% of the profit will be for the owner and 60% for the mu<u>d</u>ārab. The owner's son will work with the mu<u>d</u>ārab as a manager, and he will receive 10% of the profit. Is this arrangement permissible?

<u>Answer</u>

It is correct and permissible to specify the profits on a percentage basis. It is also correct for the owner to appoint his son as the manager, and he too will get 10% of the profit. In this mu<u>d</u>ārabah agreement, the owner's son will be like an outsider, and it is

permissible to apportion a percentage of the profit to an outsider in exchange for the latter's work.

شرح المجلة:

وتعيين حصة العاقدين من الربح... أن يكون جزئًا شايعاً قل أو كثر كالنصف أو الثلث لأن الشركة فى الربح إنما تتحقق به.(شرح المجلة: ٤/٣٣٣، وكذا فى الهداية: ٣/٢٥٨، و ٢٦٤)

الفتاوى الهندية:

ولو اشترط أن يعمل عبد رب المال مع المضارب... ولو كان عبد رب المال عليه دين فاشترط له أجر عشرة دراهم كل شهر أو اشترط ذلك لمكاتبه أو لابنه جاز. (الفتاوى الهندية: ٤/٢٨٨)

وكذا لو كان مكاتب المضارب لكن بشرط أن يشترط عمله فيهما وكان المشروط للمكاتب له لا لمولاه وإن لم يشترط عمله لا يجوز وعلى هذا غيره من الأجانب فتصح المضاربة... والمرأة والولد كالأجانب هنا كذا فى النهاية. (فتاوى الشامى: ٥/٦٥٣، وكذا فى البحر: ٧/٢٦٧، والمبسوط للسرخسى: ٢٢/٢٨، والفتاوى الهندية: ٤/٢٨٩)

Allāh taʿālā knows best.

PARTNERSHIP

Being a partner in the income without having done any work

Question

Zayd is a tailor who is well-known throughout the city. Occasionally, he sits at a shop which runs under his supervision. Three persons work as tailors in the shop. Zayd does not do any of the work. He comes and sits there for a few hours, but is an equal partner in the income which they receive. Is it permissible for Zayd to take a wage without having done any work?

Answer

The jurists classify the above arrangement as shirkat-e-ṣanā'i'. It is permissible on the basis of thoughtfulness. Although it outwardly appears to be an ijārah agreement, it is a shirkat agreement. It is also described as shirkat-e-taqabbul, shirkat-e-a'māl and shirkat-e-abdān. In other words, partners accept work from people on the basis of their popularity and status, and the payment which they receive for the work is distributed among themselves. Based on this explanation, it is permissible for Zayd to be a partner in the income even though he does not do any work.

الدر المختار:

وإما تقبل وتسمى شركة صنائع وأعمال وأبدان. وفي رد المحتار: والمراد عقد الشركة على التقبل والعمل... وفى البحر: لو اشتركا على أن يتقبل أحدہما المتاع ويعمل الآخر ...جاز كذا فى القنية... وفى النہر: أن المشترک فيہ إنما ہو العمل، ولذا قالوا: من صور ہذه الشركة أن يجلس آخر على دكانہ فيطرح عليہ العمل بالنصف، والقياس أن لا تجوز لأن من أحدہما العمل ومن الآخر الحانوت، واستحسن جوازہا، لأن التقبل من صاحب الحانوت عمل. (الدر المختار مع رد المحتار: ٤/٣٢٢، مطلب فى شركة التقبل، سعيد)

بدائع الصنائع:

ولو أن رجلاً أجلس في دكانہ رجلاً يطرح عليہ العمل بالنصف فالقياس أن لا تجوز ہذه الشركة لأنها شركة العروض لأن من أحدہما العمل ومن الآخر الحانوت والحانوت من العروض وشركة العروض غير جائزة وفى الاستحسان جائزة، لأن ہذه شركة الأعمال لأنها شركة التقبل وتقبل العمل من صاحب الحانوت عمل وشركة الأعمال جائزة بلا خلاف بين أصحابنا لأن مبناہا على الوكالة والوكالة على ہذا الوجہ جائزة بأن يوكل خياط أو قصار وكيلاً يتقبل لہ عمل الخياطة والقصارة وكذا يجوز لكل صانع يعمل بأجر أن يوكل وكيلاً يتقبل العمل. (بدائع الصنائع: ٦/٦٤، كتاب الشركة، سعيد)

وللاستزادة انظر: (النتف فى الفتاوى، ص ٣٢٥، بيروت. تبيين الحقائق: ٥/١٤٧، باب فسخ الاجارة، ملتان. وحاشية الشلبى على التبيين: ٣/٣٢١، ملتان)

If the business does not belong to him, but people bring the work to him because of his popularity in the city – in other words, he accepts the work because of his popularity while someone else does the work – and both are partners in the money they receive as payment, then it is still permissible based on common practice.

شركة الصنائع وہي شركة التقبل، لأن شركة التقبل أن يكون ضمان العمل عليهما وأحدہما يتولى القبول من الناس والآخر يتولى العمل لحذاقتہ، وہو متعارف فوجب القول بجوازہا للتعامل بها، قال صلى اللہ عليہ وسلم: ما رآه المسلمون حسناً فهو عند اللہ حسن. (العناية فى شرح الهداية، على ہامش تكملة فتح القدير: ٩/١٥٠، دار الفكر)

Objection:

Most jurists object against the author of *al-Hidāyah* for having referred to shirkat-e-ṣanā'i' as shirkat-e-wujūh whereas the latter is a different transaction. What is the answer to it?

Answer:

The author of *al-Hidāyah* is also of the view that the transaction under discussion falls under shirkat-e-taqabbul. He writes:

فهذا بوجاہتہ یقبل وہذا بحذاقتہ یعمل. (الہدایة: ٣/٣١٧، مسائل منثورة، کتاب الاجارات)

He referred to it as shirkat-e-wujūh for two probable reasons:

1. Popularity plays a major role in this agreement. In fact, it is dependent on it. Moreover, status and popularity are causes for work. This is the objective of partnership in this type of transactions.
2. This agreement is similar to shirkat-e-wujūh in the sense that benefit is derived from popularity and status.

This is supported by the following text which is found in some editions of *al-Hidāyah*:

لأن ہذه کشرکة الوجوه فی الحقیقة.

As stated in: الدر المنتقی علی ہامش المجمع: (٢/٤٠٣)

شرح الوقایہ:

ففی الہدایة حملہ علی شرکة الوجوه وفیہ نظر لأنہ شرکة الصنائع والتقبل، فکأنہ صاحب الہدایة أطلق شرکة الوجوه علیہ لأن أحدہما یقبل العمل بوجاہتہ وہذا العقد غیر جائز قیاساً ...وجائز استحساناً ووجہہ أن تخصیص قبول العمل بأحدہما لا یدل علی نفیہ من الآخر فإذا عقدت شرکة الصنائع ویقبل أحدہما العمل ویعمل الآخر فیجوز فکذا ہہنا والحاجة ماسة بمثل ہذا العقد فجوزناه. (شرح الوقایة: ٣/٣١٣)

تبیین الحقائق:

وقول صاحب الہدایة ہذه شرکة الوجوه فی الحقیقة فہذا بوجاہتہ یقبل وہذا بحذاقتہ یعمل فیہ نوع إشکال، فإن تفسیر شرکة الوجوه أن یشترکا علی أن

يشتريا شيئاً بوجوههما ويبيعا وليس في هذه بيع ولا شراء فكيف يتصور أن تكون شركة الوجوه وإنما هي شركة الصنائع على ما بينا. (تبيين الحقائق: ٥/١٤٧، باب فسخ الاجارة، ملتان)

وقال فى مجمع الأنهرشرح ملتقى الأبحر جواباً عما أشكل عليه العلامة الزيلعي في شرح الكنز:

لكن يمكن التوفيق بأن مراد صاحب الهداية بشركة الوجوه ليس ما هو المصطلح عليه المار في كتاب الشركة بل مراده بها ههنا ما وقع فيه تقبل العمل بالوجاهة يرشدك إليه قوله: هذا بوجاهته يقبل وهذا بحذاقته يعمل ويمكن بوجه آخر أنه أطلق عليه شركة الوجوه تغليباً لجهة الوجاهة على العمل لكونها سبباً تأمل. (مجمع الانهر شرح ملتقى الابحر: ٢/٤٠٢. وكذا فى حاشية ابن عابدين: ٦/٩٠، مسائل شتى، سعيد. ونتائج الافكار: ٩/١٥١، دار الفكر)

وفى الدر المنتقى في شرح الملتقى على هامش المجمع: قوله (صح) هذا الفعل استحساناً لأنه شركة الصنائع وفي بعض نسخ الهداية أنه كشركة الوجوه (قلت) وحينئذٍ فيسقط نظر الزيلعي والعيني فتأمل. (الدر المنتقى على هامش المجمع: ٢/٤٠٣)

وللاستزادة انظر: (البناية شرح الهداية: ٣/٦٩٣. نتائج الافكار: ٩/١٥١، دار الفكر. ودرر الحكام شرح غرر الاحكام: ٢/٢٤٠. والكفاية شرح الهداية على هامش فتح القدير: ٨/٩٠، مكتبه رشيدية)

Allāh taʿālā knows best.

When one heir conducts the business of the estate

Question

A person passed away and the estate was not distributed. The two sons of the deceased continued their father's business and earned immense profits. After ten years have passed, they want to distribute the estate.

Will all the heirs have a share in the profits or will it be only what was present at the time of the person's demise which will be divided among the heirs?

Answer

Before the distribution of the deceased's wealth, all the heirs will be partners in whatever profits were made. Although the other heirs were not involved in the business of the partnered wealth, they will be partners in the profits. All the wealth together with the profits will be divided among all the heirs as per the Sharīʿah prescription. Yes, it will be appropriate to give a little extra to those who worked in the business. But this is not obligatory according to the Sharīʿah.

إذا عمل أحد الشريكين دون الآخر بعذر أو بغيره فالربح بينهما قوله إذا عمل أحد الشريكين ...الخ. إنما كان الربح بينهما، لأن استحقاق الربح بحكم الشرط فى العقد لا العمل، كما فى البزازية في آخر فصل ما يكون للشريک، وقوله بعذر لا يصح تعلقه بالفعل المذكور كما هو ظاهر وليس ثم غيره يصح تعلقه به، وحينئذٍ فالصواب أن يقول كما فى البزازية، ويستوى أن يمتنع الآخر بعذر أو بغير عذر، لأن العقد لا يرتفع بمجرد امتناعه. (الاشباه والنظائر مع غمز عيون البصائر: ٢/٩٧)

The gist of the above text is that if one partner does not do any work, he will still receive his full share from the partnered wealth. This is irrespective of whether this partner is excused from working or not.

وللاستزادة انظر: (المجلة وشرحها لمحمدخالد الاتاسى: المادة: ١٣٩٢، ٨٣)

The jurists refer to this type of partnership as shirkat-e-imlāk.

تبيين الحقائق:

شركة الملک أن يملک اثنان عيناً إرثاً أو شراء...وكل أجنبي في قسط صاحبه أى كل واحد منهما أجنبي في نصيب صاحبه حتى لا يجوز له أن يتصرف فيه إلا بإذنه كما لغيره من الأجانب. (تبيين الحقائق شرح كنز الدقائق: ٣/٣١٣)

المبسوط:

فشركة الملک أن يشترک رجلان في ملک مال وذلک نوعان ثابت بغير فعلهما كالميراث، وثابت بفعلهما وذلک بقبول الشراء أو الصدقة أو الوصية والحكم واحد وهو أن ما يتولد من الزيادة يكون مشتركاً بينهما بقدر الملک وكل واحد منهما بمنزلة الأجنبي فى التصرف في نصيب صاحبه. (المبسوط للسرخسى: ١١/١٥١)

Objection:

Some scholars say that the profit will be specifically for those who engage in the transactions and do the work. The other heirs will not receive anything from the profits. They quote the following statement as proof:

لو تصرف أحد الورثة فى التركة المشتركة و ربح فالربح للمتصرف وحده، كذا فى الفتاوى الغياثية. (الفتاوى الهندية: ٢/٣٤٦)

Answer:

Because the above-quoted text is in conflict with other books of jurisprudence, it would mean that the person exercised his will and took some money from the partnered amount. After exercising his will over it, the profit will be his. Reference to this is also made in *Fatāwā Maḫmūdīyyah*, vol. 20, p. 309.

The other answer is that our seniors did not issue such a fatwā; their fatwā is different from it.

Observe the following in *Kifāyatul Muftī*:

ʿAmr engaged in business with goods which were co-owned. He made profits and increased the wealth. It will be distributed among all the heirs. It will not be considered to be only his estate.

وعمله وتصرفه يكون تبرعاً ووجهه أنه شريک في بعضه وعامل بنت أخيه في بعضه وهي في عياله، وليس ههنا عقد ولا غصب.[1]

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[1] *Kifāyatul Muftī*, vol. 8, p. 269.

A similar answer is given at another place. Refer to *Kifāyatul Muftī*, vol. 8, p. 274.

Fatāwā Dār al-ʿUlūm:

Answer: Since Zayd and ʿAmr are both buyers of the above-mentioned property, they are 50/50 partners. After them, their heirs will take their place. Therefore, the claim of the heirs is correct and valid.

فى رد المحتار: قوله ولزمه نصف الثمن بناء على أن مطلق الشركة يقتضى التسوية.[1]

Further reading: *Imdād al-Ahkām*, vol. 3, pp. 319-322.

If we say that the heir exercising his will is similar to an outsider exercising his will – and this is not permissible – then the answer will be the same. That is, whatever profits a person makes by exercising his will over an outsider's wealth has to be given in charity, and if the owner is known, they have to be conveyed to him. Here, the heirs are known. Therefore, the profits will be distributed with the original estate as per the Sharīʿah-prescribed shares.

وفى القهستاني: وله أن يؤديه إلى المالک ويحل له التناول لزوال الخبث. (فتاوى الشامى: ٦/١٨٩، كتاب الغصب، سعيد)

Imdād al-Ahkām:

Question: Before the money of an estate could be distributed, one of the partners gave it to someone else as mudārabah without informing the other partners. The mudārab used the money to buy goods and made profits from them. Is this mudārabah valid? Is the mudārab eligible to take the fifty percent of the profits as was agreed upon?

Answer: The specified profit has gone into the ownership of the partner who gave the money as mudārabah. From it, only his share according to the estate is halāl. The remaining profit is tainted. This is why he will have to give the other heirs according to their shares.[2]

Allāh taʿālā knows best.

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[1] *Fatāwā Dār al-ʿUlūm Deoband*, vol. 1, p. 597.

[2] *Imdād al-Ahkām*, vol. 3, 319.

Selling one’s share

Question

Two brothers have a house which is valued at two million. One brother has a house of his own for which he wants rent. He does not want to sell the shared house. The other brother has no house. He wants to sell the house. Whose word should be considered?

Answer

If both were partners or heirs from the beginning, then each one can sell his portion without the permission of the other. However, if the sale would harm the other partner, or it will be to the disadvantage of the buyer and seller, he cannot sell his portion. This is similar to selling a building, tree or crop – it cannot be sold without the permission of the partner.

In the case under question, the word of the one who does not want to sell the house will be considered. One partner cannot sell the house without the permission of the other because the house is made up of a building.

شرح المجلة:

الشريک مخير إن شاء باع حصته من شريکه وإن شاء باعها من أجنبي بدون إذن شريکه ...لکن في صور خلط الأموال واختلاطها التي بيناها فى الأصل الأول لا يسوغ لأحد الشريکين فى الأموال المخلوطة أو المختلط أن يبيع حصته من آخر بدون إذن شريکه.

أما لو باعها بإذن شريکه أو باعها من شريکه جاز کما فى الملتقى وغيره، والفرق أن الشرکة إذا کانت بينهما من الابتداء بأن اشتريا حنطة أو ورثاها کانت کل حبة مشترکة بينهما فبيع کل منهما نصيبه شائعاً جائز من الشريک والأجنبي بخلاف ما إذا کان بالخلط أو الاختلاط، لأن کل حبة مملوکة لأحدهما بجميع أجزائها ليس للآخر فيها شرکة فإذا باع نصيبه من غير إذن الشريک لا يقدر على تسليمه إلا مخلوطاً بنصيب الشريک فيتوقف على إذنه بخلاف بيعه من الشريک للقدرة على التسليم (مجمع الأنهر) قلت: ومثل

الخلط والاختلاط بيع ما فيه ضرر على الشريک أو البائع أو المشتري كبيع الحصة الشائعة من البناء أو الغرس أو الزرع بدون الأرض وقد استوفينا الكلام على ذلک في شرح المادة: ٢١٥. ومثله لو باع أحد الشريكين بيتاً معيناً باع من دار مشتركة أو باع نصيبه من بيت معين منها فالبيع لا يجوز (درمختار) وذلک لتضرر الشريک الآخر عند القسمة إذ لو صح البيع في نصيب البائع لتعين نصيبه فيه.

فإذا وقعت القسمة للدار كان ذلک ضرراً على الشريک إذ لا سبيل إلى جمع نصيب الشريک فيه لأن نصفه للمشتري ولا جمع نصيب البائع فيه لفوات ذلک بيعه النصف وإذا سلم الأمر من ذلک انتفى ذلک وسهل طريق القسمة (خيرية من البيوع) (شرح المجلة لسليم رستم باز اللبناني، ص: ٢٠٩)

وللاستزادة انظر: (شرح المجلة لمحمد خالد الاتاسي: ٢/١٠٨-١١٥، المادة: ٢١٥)

Allāh ta'ālā knows best.

Profits from the sale of non-Sharī'ah shares

Question

In 2004, a person bought shares to the value of R20 000.00 from Oasis Investments. At the time, the investment scheme was in line with the Sharī'ah. Now the person says that it is no longer compliant to the Sharī'ah. He therefore sold all his shares and received R47 000.00. In other words, he made a profit from his capital investment. Can he use the profit which he received?

Answer

As long as the company was trading according to the Sharī'ah, its profits are halāl and permissible. From the time it started trading in conflict with the Sharī'ah, the profit from that time must be given in charity without the intention of reward.

Fiqhī Maqālāt:

The following are prerequisites for the sale and purchase of shares:

1. The fundamental business must be halāl.

2. If the company engages in usurious transactions, the matter must be brought up in its annual meeting.
3. When the profits are distributed, the profits which were acquired from usurious deposits must be given in charity.

Further reading: *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5, p. 164.

Allāh taʿālā knows best.

Trading in company shares

Question

A company deals in the trading of shares on a large scale. Because of the immense profits made from them, people buy as many as they can. However, certain conditions have been laid down due to which the ʿulamā' are hesitant in stating their permissibility. Observe the following conditions:

1. A shareholder may not sell his shares to anyone for three years.

2. Only Africans (blacks) and Indians may buy them.

Some ʿulamā' say that Rasūlullāh sallallāhu ʿalayhi wa sallam prohibited the attachment of a condition to a sale. This is why this is not permissible. Kindly explain.

Answer

If the nature of the company's is not usurious, and this transaction does not entail usury, then this agreement will not be impermissible because of these conditions. The first condition is related to specifying a time-period. That is, the shares cannot be sold for three years. This means that the person is a partner for up to three years and the agreement is time-bound. After that, he may sell the shares, maintain his partnership, or terminate it.

The condition of specifying the sale to Africans and Indians is not out of consideration to the wellbeing of the two parties but for national benefits. Furthermore, this condition does not lead to dispute, so there is leeway for it.

الهداية:

ولو كان لا يقتضيه العقد ولا منفعة فيه لأحد لا يفسده وهو الظاهر من المذهب كشرط أن يبيع المشترى الدابة المبيعة لأنه انعدمت المطالبة فلا يودى إلى الربا ولا إلى المنازعة. (الهداية: ٣/٥٩، باب البيع الفاسد)

شرح المجلة:

وحاصل ما ذكره الفقهاء فى البيع مع الشرط أن الشرط الذي يقترن به البيع إما أن يقتضيه العقد وإما أن لا يقتضيه العقد لكن يلايمه وإما ان لا يقتضيه العقد ولا يلايمه لكن قد جرى العرف باشتراطه، وإما أن لا يقتضيه العقد ولا يلايمه ولا جرى العرف باشتراطه لكن لا منفعة فيه لأحد، فالبيع في هذه الوجوه الأربعة صحيح، والشرط معتبر فى الوجوه الثلاثة الأولى منها، ويلغو فى الوجه الرابع. (شرح المجلة لمحمد الاتاسى: ٢/٥٩)

وفيه أيضاً: البيع بشرط ليس فيه نفع لأحد المتعاقدين يصح والشرط لغو، مثلاً بيع الحيوان على أن لا يبيعه المشتري لآخر أو على شرط أن يرسله فى المرعى صحيح، والشرط لغو. (شرح المجلة: ٢/٦٥، المادة: ١٨٩)

A time-bound partnership:

قال فى الهندية: وإن وقتا هل يتوقت بالوقت المذكور، روى بشر عن أبي يوسف عن أبي حنيفة أنه يتوقت والطحاوي ضعف هذه الرواية، وصححها غيره من المشايخ، وهو الصحيح. (الفتاوى الهندية: ٢/٣٠٢)

وفى الهداية: المضاربة عقد يقع على الشركة بمال من أحد الجانبين ومراده الشركة فى الربح ...إن وقت للمضاربة وقتاً بعينه يبطل العقد بمضيه، لأنه توكيل فيتوقت بما وقته والتوقيت مفيد، فإنه تقييد بالزمان فصار كالتقييد بالنوع والمكان. (الهداية: ٣/٢٦١، ٢٥٧)

فتاوى الشامى:

وإن وقتا لذلک وقتاً بأن قال: ما اشتريت اليوم فهو بيننا صح التوقيت، فما اشتراه بعد اليوم يكون للمشتري خاصة وكذا لو وقت المضاربة لأنها والشركة توكيل، والوكالة مما يتوقت. (فتاوى الشامى: ٤/٣١٢، سعيد)

In short, the first condition is not an invalidator of the transaction because the benefit is not for the two parties but for national interests. A condition of this nature is not included in the invalid conditions as explained by the jurists. The second condition is not really a condition. It is a time-bound partnership, and the jurists permit it. Therefore, it does not entail a sale and a precondition which is prohibited in the Hadīth.

Allāh taʿālā knows best.

The labourers of a company having several partners

Question

A company has several partners. One of them is affiliated to a church. The company has several departments. One department makes all the arrangements for its labourers, e.g. their boarding and lodging. These labourers are then given over in employment to other companies in exchange for money. My question is: Is it permissible to transact with this department and to employ its labourers, bearing in mind that the company is affiliated to a church? Bear in mind that the labourers do not engage in their worship and other religious practices at the place of work. They only do their work.

Answer

It is permissible to hire and employ non-Muslims. They will not be worshipping at your place, and it will not entail aiding in sin. You will merely pay them for their work; not for anything else. This is why there is no objection whatsoever to doing business with such a company. Yes, if the company is involved in secret conspiracies against Muslims, one should abstain from dealing with it.

عن عائشة رضي الله تعالیٰ عنها استأجر النبي صلى الله عليه وسلم وأبو بكر رضي الله عنه رجلاً من بنى الديل وهو من بنى عبد بن عدى هادياً خريتاً، الخريت الماهر بالهداية قد غمس حِلْفاً في آل العاص بن وائل السهمي وهو على

دين كفار قريش فأَمِنَاه فدفعا إليه راحلتيهما وواعداه غار ثور ...الخ. (صحيح البخارى، برقم ٢٢٦٣، باب ہجرة النبى صلى الله عليه وسلم واصحابه الى المدينة)

الفتاوى الهندية:

لا بأس بأن يكون بين المسلم والذمي معاملة إذا كان مما لا بد منه كذا فى السراجية. (الفتاوى الهندية، ٥/٣٤٨، كتاب الكراہية، باب فى اہل الذمة)

بدائع الصنائع:

وإسلامه ليس بشرط أصلاً فتجوز الإجارة والاستئجار من المسلم والذمي والحربي المستامن لأن ہذا من عقود المعاوضات فيملكه المسلم والكافر جميعاً كالبياعات الخ. (بدائع الصنائع: ٤/١٧٦، كتاب الاجارة، سعيد)

Fatāwā Mahmūdīyyah:

Question: Is it permissible to ask a non-Muslim to stitch a kafan (shroud)?

Answer: It is permissible just as other transactions with them are permissible.[1]

Allāh taʿālā knows best.

Buying shares in a company whose business is mixed

Question

A company engages in halāl and harām business. How is it to deal with it or to buy shares in it?

Answer

Buying shares in a company is acceptable provided the following conditions are met:

1. The core business of the company is not in conflict with the Sharīʿah. For example, providing investment services on the basis of

[1] *Fatāwā Mahmūdīyyah*, vol. 19, p. 587.

usury. In other words, shares in a bank, insurance company, or shares in a company which is involved in some other impermissible business. For example, companies which prepare or sell alcohol, pork, h̲arām meat; or companies which are involved in gambling, night clubs, immorality and so on. It is not permissible to buy shares in these companies and to do business with them.

2. If the core business of the company is h̲alāl – e.g. sale of automobiles, textiles, etc. – but it deposits its extra capital in an interest-bearing account or takes loans on interest, then it is necessary for the shareholders to express their disapproval of such transactions. The best way of doing this is to raise one's voice against these transactions in the annual meeting of the company.

3. If the income of the company includes income from usurious transactions, then the shareholder must deduct that percentage from his dividends and give it in charity. The shareholder must not take any benefit from it. For example, if from the total profits of the company, five percent was derived from usurious accounts, the shareholder must give five percent of his dividends in charity.

Further reading: *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5, p. 164.

Imdād al-Fatāwā:

Question: Most companies receive and pay interest. In such a situation, interest money comes into the share of every shareholder. Is it permissible for the shareholder to accept the dividends of his shares which are adulterated with interest money?

Answer:

الجواب: ...وفى المبسوط: يكره للمسلم أن يدفع إلى النصراني مالاً مضاربة وهو جائز فى القضاء - (ص ١٢٥، ج ٢٢) وفيه أيضاً: وأبو حنيفة يقول: الذي ولى الصفقة هو الوكيل والخمر مال متقوم في حقه يملك أن يشتريها لنفسه فيملك أن يشتريها لغيره وهذا لأن الممتنع ههنا بسبب الإسلام هو العقد على الخمر لا الملك فالمسلم من أهل أن يملك الخمر، ألا ترى أنه لو تخمر عصير المسلم يبقى ملكاً له ثم إذا تخلل جاز له بيعه وأكله إذا مات قريبه عن خمر يملكها بالإرث فإن اعتبرنا جانب العقد فالعاقد من أهله وهو في حقوق

العقد كالعاقد لنفسه وإن اعتبرنا جانب الملک فالمسلم من أهل ملک الخمر فيصح التوكيل. (ص ٢١٦، ج ١٢)

فإن قيل ذكر فی الهندية في باب المضاربة بين أهل الإسلام وأهل الكفر إذا دفع المسلم إلى النصراني مالاً مضاربة بالنصف فهو جائز إلا أنه مكروه فإن اتجر فی الخمر والخنزير فربح جاز على المضاربة في قول أبي حنيفة وينبغي للمسلم أن يتصدق بحصته من الربح وعندهما يجوز على المضاربة، وإن أربى فاشترى درهمين بدرهم كان البيع فاسداً ولكن لا يصير ضامناً لمال المضاربة والربح بينهما على الشرط. (ص ٤٠٢، ج ٥)

قلنا قوله ينبغی للمسلم أن يتصدق بحصته محمول على الورع كما هو الظاهر وإن حمل على الوجوب فهو إذا كان قد اتجر فی الخمر والخنزير ولم يتجر في غيرهما وإلا فحمله على ما سيجيئ فی المخلوط. وقوله في صورة إرباء الوكيل كان البيع فاسداً لا يضرنا فإن الوكيل بالبيع كالعاقد لنفسه وفساد البيع في حق الذمي لا يستلزم حرمة الربح على المسلم فإن تبدل الملک يدفع خبث الفساد وأما على قول من جوز الربا بين المسلم والكافر في دار الحرب فالأمر أوسع.

In the above case, the profits will not be impermissible even if those who established the company are non-Muslims. However, it is makrūh to buy shares in non-Muslim companies. This is gauged from the text of *al-Mabsūṭ*. If Muslim companies also engage in usurious transactions – as is the case in majority instances today – then it is a lesser evil to buy shares in non-Muslim companies.

ولنذكر بعد ذلک حکم المال المختلط بالحرام والحلال، قال قاضيخان رح:...

فإذا خلط الوكيل دراهم الربا بعضها ببعض الدراهم التي أخذها من حلال يجوز أخذ الربح منها لكون الخلط مستهلكاً عند الإمام لا سيما إذ كان الوكيل كافراً لا سيما والتقسيم مطهر عندنا كما إذا بال البقر فی الحنطة وقت الدياسة

فاقتسمها الملاک حل لکل واحد أکلها مع التیقن بکون الحنطة مختلطة بالطاہر والنجس ولکن القسمة أورثت احتمالاً في حصة کل واحد من الشرکاء فحکمنا بطہارة نصیب کل واحد منہم فکذا ہہنا إذا أربی الوکیل بالتجارة وخلط الدراہم بعضہا ببعض ثم قسمہا علی الشرکاء یحکم بحل نصیب کل واحد منہم، واللہ أعلم.

وأخرج البیہقي في سننہ في باب کراہیة مبایعة من أکثر مالہ من الربا أو ثمن المحرم من طریق شعبة عن مزاحم عن ربیع بن عبد اللہ أنہ سمع رجلاً سأل ابن عمر أن لي جاراً یأکل الربا أو قال خبیث الکسب وربما دعاني لطعامہ أفأجیبہ، قال: نعم.

ومن طریق مسعر عن جواب التیمي عن الحارث بن سوید قال جاء رجل إلی عبد اللہ یعنی ابن مسعود رضي اللہ عنہ فقال: إن لي جاراً لا اعلم لہ شیئاً إلا خبیثاً أو حراماً وأنہ یدعوني فأحرج أن آتیہ أو أتحرج أن لا آتیہ؟ فقال: ائتہ أو أجبہ فإنما وزرہ علیہ، قال البیہقي: جواب التیمی غیر قوي وہذا إذا لم یعلم أن الذي قدم إلیہ حرام، فإذا علم حراماً لم یأکلہ. (ص ٣٣٥، ج ٢)

قلت: جواب التیمی وثقہ ابن حبان ویعقوب بن سفیان کما فی التہذیب. (ص ١٢١ و١٢٢، ج ٢) ماخوذ از (امداد الفتاویٰ: ٤٩٦/٣-٤٩٨، کتاب الشرکة)

Further reading: *Jadīd Fiqhī Mabāhith*, vol. 16, p. 45.

Allāh taʿālā knows best.

Fundamental principles for Islamic partnerships

Question

Respected Muftī Sāhib

Kindly observe the following details with regard to an agreement for conducting business in an Islamic way:

Two partners want to do business in an Islamic way. What agreement should they make bearing in mind the following situation:

One partner provides the goods only while the other partner provides money and does the work. The first partner wants annual profits, while the second partner wants profits together with a wage for doing the work. How should the following matters be conducted:

1. How much capital should each partner put in – the one who does the physical work and the one who does not?
2. Is it permissible to lay down the condition of only one partner doing the work?
3. Explain the distribution of profits and losses, and the ruling with regard to reinvesting the profits into the partnership.
4. What is the ruling with regard to a time-bound partnership?
5. What is the ruling with regard to paying taxes according to governmental law and zakāh according to Islamic law?
6. The salary for both partners and a partner taking money for his personal needs.
7. A partner entering into a loan agreement with someone. In other words, if he takes a loan for the business, on whose behalf will it be?
8. How will the profits be distributed?
9. How will the effects and capital of the company be distributed?
10. If either of the partners passes away, will the partnership continue?

Answer

(1)

Partners have the choice to put as much capital as they want after mutual agreement. It is not necessary to impose a specific portion on anyone. (*al-Hidāyah*, vol. 2, p. 630)

(2)

It is permissible to lay down the condition of work for only one partner. However, this is a combination of mushārakah and muḏārabah. (Details in this regard can be found in *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5, p. 47. This issue was explained briefly in the chapter on muḏārabah.) Yes, there will be a difference in the distribution of the profit. This will be explained further on.

(3)

The fundamental principles for distributing profits:

1. For a partnership to be valid, it is a prerequisite for the profit sharing to be specified on a percentage basis. Each one must know what percent he will receive. For example, 50% for each partner, or 40% for one and 60% for the other.

It is not permissible to specify an amount which a partner will receive monthly. For example, one thousand rand per month.

It is also not permissible to specify the percentage on the basis of the capital investment. For example, if the capital of one partner is R100 000.00, he will receive 20% of the capital, i.e. R20 000.00. This is not permissible.

قال فى البدائع: ومنها أن يكون الربح معلوم القدر، فإن كان مجهولاً تفسد الشركة، لأن الربح هو المعقود عليه، وجهالته توجب فساد العقد...ومنها أن يكون الربح جزءاً مشاعاً فى الجملة لا معيناً، فإن عينا عشرة أو مائة كانت الشركة فاسدة، لأن العقد يقتضي تحقق الشركة فى الربح، والتعيين يقطع الشركة لجواز أن لا يحصل من الربح إلا القدر المعين لأحدهما ...الخ. (بدائع الصنائع: ٦/٥٩، سعيد. وكذا فى الهداية: ٢/٦٣٢. والفتاوى الهندية: ٢/٣٠٢)

2. If both partners agree that the profits of each will be based on the ratio of the capital which each partner put in, this will be permissible irrespective of whether the capital is half each, or one is more than the other. And irrespective of whether both partners agreed to do the work or only one partner will do the work.

قال فى البدائع: فنقول: إذا شرطا الربح على قدر المالين متساوياً أو متفاضلاً فلا شك أنه يجوز، ويكون الربح بينهما على الشرط سواء شرطا العمل عليهما أو على أحدهما. (بدائع الصنائع: ٦/٦٢، سعيد)

3. If a partner does the work as well, it is permissible to give him an additional profit more than the capital proportion. This is irrespective of whether the other partner does the work or not. For example, H̲āmid and Mah̲mūd invested R100 000.00 each and the condition of work was applied on Mah̲mūd. It is permissible to specify a profit of 70% for Mah̲mūd.

وإن كان المالان متساويين فشرطا لأحدہما فضلاً على ربح ينظر: إن شرط العمل عليہما جميعاً جاز والربح بينہما على الشرط في قول أصحابنا الثلاثة ...وإن كان المالان متفاضلين وشرط التساوي فى الربح فہو على ہذا الخلاف أن ذلک جائز عند أصحابنا الثلاثة، وكان زيادة الربح لأحدہما على قدر رأس مالہ بعملہ وأنہ جائز. (بدائع الصنائع: ٦/٦٢، ٦٣، سعيد. والفتاوى الہندية:٢/٣٢٠)

4. If a partner does not do any work, then the majority of scholars say that it is not permissible to specify an amount for him which is more than the proportion of his capital. For example, H̲āmid and Mah̲mūd invested R100 000.00 each and the condition of work was applied on Mah̲mūd only. It is not permissible to specify more than 50% of the profits for H̲āmid .

وإن كان المالان متساويين ...شرطا العمل على أحدہما ...وإن شرطاه على أقلہما ربحاً لم يجز، لأن الذي شرطا لہ الزيادة ليس لہ فى الزيادة مال ولا عمل و لا ضمان. (بدائع الصنائع: ٦/٦٣، سعيد)

Further reading: *Islām Aur Jadīd Maʽāshī Masā'il*, vol. 5, p. 47.

5. If one partner invests more capital and the condition of work was applied to him, it is not permissible to divide the profit equally. For example, H̲āmid invested R100 000.00 and Mah̲mūd invested R150 000.00, and the condition of work was applied on Mah̲mūd. It will not be permissible to divide the profit between the two on a 50%/50% basis.

وإن كان المالان متفاضلين وشرطا التساوى فى الربح ...شرطا العمل على أحدہما ...وإن شرطاه على صاحب الأكثر لم يجز، لأن زيادة الربح في حق صاحب الأقل لا يقابلہا مال ولا عمل ولا ضمان. (بدائع الصنائع: ٦/٦٣، سعيد)

The jurists concur that if the partnership suffers a loss, the compensation for it will be in proportion to each partner's capital. For example, H̲āmid and Mah̲mūd are partners. H̲āmid invested 60%

Mahmūd invested 40%. Assuming they suffer a loss of R1 000.00, Hāmid will bear R600.00 and Mahmūd will bear R400.00

The following narration from the *Musannaf* of ʿAbd ar-Razzāq supports this:

عن الشعبي عن علي رضي الله عنه فى المضاربة: الوضيعة على المال والربح على ما اصطلحوا عليه، وأما الثوري فذكره ...عن علي رضي الله عنه فى المضاربة أو الشريكين. (مصنف عبد الرزاق: ٨/٢٤٨، المجلس العلمى)

بدائع الصنائع:

والوضيعة على قدر المالين متساوياً ومتفاضلاً، لأن الوضيعة اسم لجزء هالك من المال، فيتقدر بقدر المال. (بدائع الصنائع: ٦/٦٢، سعيد)

If the partners do not distribute the profit and instead reinvest it into the business, then this is permissible. The capital of each one will be counted accordingly. For example, Hāmid and Mahmūd invested R100 000.00 each on the condition of 50% each. They made a profit of R50 000.00. Instead of distributing it among themselves, they reinvested it into the business. The capital of each one will now be R125 000.00.

(4)

It is permissible for the partners to agree on a time for the partnership through mutual agreement. For example, two years or three years, etc.

قال فى الشامية نقلاً عن الخانية: وإن وقتا لذلک (أى للشركة) وقتاً بأن قال: ما اشتريت اليوم فهو بيننا صح التوقيت، فما اشتراه بعد اليوم يكون للمشتري خاصة، وكذا لو وقت المضاربة لأنها والشركة توكيل، والوكالة مما يتوقت. (فتاوى الشامى: ٤/٣١٢، سعيد)

Further reading: *al-Fatāwā al-Hindīyyah*, vol. 2, p. 302; *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5, p. 46.

(5)

There is no zakāh on a partnership company or business. Each partner will have to pay zakāh according to the amount which he owns.

Further reading: *Fatāwā Dār al-ʿUlūm Zakarīyyā*, vol. 3.

(6)

The jurists differ on the issue of specifying a wage for a partner. Details in this regard were given in the chapter on muḏārabah. Kindly refer to it. In short, it is permissible according to Ḫaḏrat Muftī Rashīd Ludhyānwī Ṣāḫib raḫimahullāh. Refer to *Aḫsan al-Fatāwā*, vol. 7, pp. 321-328 for details.

(7)

If a partner takes a loan for the partnership business – and the partners have a mutual agreement that a loan can be taken when there is a need for it – then both partners will be liable to repay it.

ولو استقرض مالاً لزمهما جميعاً، لأنه تملك مال بالعقد، فكان كالصرف، فيثبت في حقه وحق شريكه. (بدائع الصنائع: ٦/٧٢، سعيد)

(8)

The manner of distributing profits was explained in detail in point number three (3).

(9)

The effects of the company will be distributed as follows:

Once the partnership ends, the time expires, or it is cancelled for whatever reason, then there are two scenarios:

1. Wealth is in the form of cash. The profit must first be distributed as per the conditions laid down. Thereafter, the capital will be distributed according to each one's share.
2. Wealth is not in the form of cash, but in the form of goods. The market rate of the goods must be established. If both partners agree, the goods must be sold and the cash must be distributed between themselves. After distributing the profit, the capital must be distributed according to the proportion of each one.

Islām Aur Jadīd Maʿāshī Masā'il:

Each partner has the right to terminate the partnership by informing the other partner. Once the notice is given, the partnership will be considered to be terminated.

In such a case, if all the effects of the partnership are in the form of cash, it will be distributed among all the partners in proportion to their shares. If the effects are not in the form of cash, the partners can

concur on one of the two options: (1) They can sell the effects and convert them to cash. (2) They can distribute them in their present condition. If the partners differ on the distribution – i.e. whether the effects should be converted to cash or be distributed in their present condition – then preference will be given to the latter. This is because after the termination of the partnership, all effects are collectively owned by all the shareholders. When an item is co-owned, each person has the right to ask for its distribution or to separate his share from it. No one can be compelled to liquidate his share. Nonetheless, if the effects are such that they cannot be separated – e.g. machinery – they should be sold and the money which is received from the sale will be distributed.[1]

(10)

When either of the partners passes away, the partnership is terminated. If both parties want, it could be renewed.

وإذا مات أحد الشريكين...بطلت الشركة. (الهداية: ٢/٦٣٥)

Islām Aur Jadīd Maʿāshī Masā'il:

If a partner dies during the period of partnership, the partnership agreement with the deceased partner terminates. His heirs have the choice of taking the deceased's share or continuing with the partnership agreement.[2]

Allāh taʿālā knows best.

Partnership in the manufacture of bricks

Question

The jurists say that partnership in the collecting of firewood is not permissible. The one who collects the firewood is its sole owner. If this is the case, what is the difference between collecting firewood and making bricks? Is it permissible to enter into a partnership in the manufacture of bricks?

Answer

Partnership in the collecting of firewood is not permissible. This is because partnership in an item which is mubāh is not permissible. As regards the manufacture of bricks, if the soil is owned by someone,

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[1] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5, p. 38.

[2] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5, p. 38.

partnership will be permissible. If the soil is mubāh and not owned by anyone, then it is like firewood. There is no difference between the two. In other words, the one who does the work will be its owner. If two persons do the work together and each person's work is not known, they will receive half each.

الدر المختار:

لا تصح شركة في احتطاب ...إلى قوله وطبخ آجر من طين مباح لتضمنها الوكالة والتوكيل في أخذ المباح لا يصح (وما حصله أحدهما فله وما حصلاه معاً فلهما نصفين إن لم يعلم ما لكل. قوله من طين مباح فإن كان الطين أو النورة أو سهلة الزجاج مملوكاً فاشتركا على أن يشتريا ذلك ويطبخاه ويبيعاه جاز، وهو كشركة الوجوه،كذا فى الخلاصة معزياً إلى الشافي، وتبعه البزازي والعيني والمذكور فى الفتح أن هذا من شركة الصنائع والأول أظهر، نهر. (الدر المختار مع رد المحتار: ٤/٣٢٥، فصل فى الشركة الفاسدة، سعيد)

وكذا فى حاشية الطحطاوى على الدر المختار: ٢/٥٢٣، كوئته)

الفتاوى الهندية:

وكذا إذا اشتركا على أن يبنيا من طين غير مملوك أو يطبخا آجراً كذا في فتح القدير فإن كان الطين أو النورة أو سهلة الزجاج مملوكاً واشتركا على أن يشتريا ويطبخا ويبيعا جاز وهي شركة الوجوه كذا فى الخلاصة. (الفتاوى الهندية: ٢/٣٣٢)

If someone enters into a partnership in a craft which cannot be carried out without having knowledge of it, then according to Ibn Humām rahimahullāh, it will be included in shirkat-e-sanā'i' and ought to be permissible. For example, expertise is required in the manufacture of bricks. Every person cannot do it without having learnt the art.

There seems to be support for the opinion of Ibn Humām rahimahullāh from the following narration of Ibn Mājah:

حدثنا أبو السائب سلم بن جنادة ثنا أبو داود الحفرى عن سفيان عن أبي إسحاق عن أبي عبيدة عن عبد الله قال: اشتركت أناْ وسعد وعمار يوم بدر فيما نصيب فلم أجئ أناْ ولا عمار بشيء وجاء سعد برجلين. (رواه ابن ماجہ، ص ١٦٥، باب الشركة والمضاربة)

Hadrat Maulānā ʽAbd al-Ghanī Mujaddidī writes in his commentary to this Hadīth:

قولہ اشتركت أناْ وسعد وعمار الخ: صورة ہذه الشركة شركة التقبل وسمى شركة الصنائع والأعمال والأبدان وہي أن يتفقا صانعان على أن يتقبلا الأعمال التي يمكن استحقاقها، ومنہ تعليم الكتابة والقرآن والفقہ على المفتى بہ، ويكون الكسب بينهما على ما شرطا مطلقاً فى الأصح لأنہ ليس بربح بل عمل فصح تقويمہ كما فى الدر المختار الظاہر أن ہذه ليست بشركة فاسدة كاحتشاش واصطياد وسائر المباحات لأن المقاتلة من جملة الصنائع ولهذا ترى الناس يأخذون فنونها وقواعدہا من أساتذة ہذا الفن. (حاشية ابن ماجہ، ص ١٦٥، باب الشركة والمضاربة)

المحيط البرہانى:

في فتاوىٰ أبى الليث: رجلان اشتركا لحفظ الصبيان وتعليم القرآن، فعلى ما أخبرنا فى "الفتوىٰ" ...تجوز ہذه الشركة. (المحيط البرہانى: ٦/٤١١، الفصل السادس فى الشركة بالاعمال، مكتبہ رشيديہ. وفتاوى النوازل: ٢٢٤، كتاب الشركة، ط: آرام باغ كراچى)

Allāh taʽālā knows best.

The prerequisites for shirkat-e-mufāwadah

Question

What are the prerequisites for shirkat-e-mufāwadah? How will the partnership continue if the prerequisites are absent?

Answer

Mufāwadah refers to each person handing himself over to the other. This partnership is known as mufāwadah because one partner hands over his wealth to the other. There has to be capital in it and equality in the profit is a prerequisite. The following points are necessary for this partnership:

1. It is essential for the capital of both partners to be equal from beginning to end.
2. Both have to be equal partners.
3. Both partners will have the right to buy and sell the goods, take loans, etc.
4. If one partner buys something for his personal use, the other partner will have no right to say anything about it. If he bought the item on credit, the one who sold it to him will have the right to demand payment from the other partner as well.
5. In this partnership, the partners are representatives, trustees and sureties of each other.
6. This partnership can only be between Muslims who are mature. Imām Abū Yūsuf and Imām Muhammad rahimahumallāh say that it is valid between a Muslim and a non-Muslim.

بدائع الصنائع:

وأما بيان شرائط جواز ہذه الأنواع فلجوازہا شرائط بعضها يعم الأنواع كلها وبعضها يخص البعض دون البعض:

وأما شرائط العامة فأنواع: منها، أہلية الوكالة لأن الوكالة لازمة فى الكل.

ومنہا، أن يكون الربح معلوم القدر.

ومنہا، أن يكون الربح جزءاً شائعاً فى الجملة لا معيناً.

وأما الذي يخص البعض دون البعض فيختلف، أما الشركة بالأموال فلها شروط:

منها، أن يكون رأس المال من الأثمان المطلقة وهي التي لا تتعين بالتعيين فى المفاوضات على كل حال وهي الدراهم والدنانير عناناً كانت الشركة أو مفاوضة عند عامة العلماء.

ومنها، أن يكون رأس مال الشركة عيناً حاضراً لا ديناً ولا مالاً غائباً فإن كان لا تجوز عناناً كانت أو مفاوضة لأن المقصود من الشركة الربح وذلك بواسطة التصرف ولا يكمن فى الدين ولا المال الغائب فلا يحصل المقصود.

ومنها، ما هو مختص بالمفاوضة وهو أن يكون لكل من الشريكين أهلية الكفالة بأن يكونا حرين عاقلين.

ومنها، المساواة في رأس المال قدراً وهي شرط صحة المفاوضة بلا خلاف.

ومنها، أن لا يكون لأحد المتفاوضين ما تصح فيه الشركة ولا يدخل فى الشركة.

ومنها، المساواة فى الربح فى المفاوضة فإن شرطا التفاضل فى الربح لم تكن مفاوضة لعدم المساواة.

ومنها، العموم فى المفاوضة وهو أن يكون في جميع التجارات ولا يختص أحدهما بتجارة دون شريكه لما فى الاختصاص من إبطال معنى المفاوضة وهو المساواة.

ومنها، لفظ المفاوضة في شركة المفاوضة،كذا روى الحسن عن أبي حنيفة أنه لا تصح شركة المفاوضة إلا بلفظ المفاوضة وهو قول أبي يوسف ومحمد. (بدائع الصنائع: ٦/٥٨- ٦١، كتاب الشركة، سعيد)

الفتاویٰ السراجية:

لا تصح شركة المفاوضة فى الأموال حتى يكون كل واحد من الشريكين من أہل الكفالة نحو أن يكونا حرين، عاقلين بالغين متفقين فى الدين...الخ. (الفتاوى السراجية، ص: ٣٦٨. وكذا فى الفتاوى الهندية: ٢/٣٠٧، باب ٢)

If any of the previously mentioned conditions are not met, the shirkat-e-mufāwadah will change to a shirkat-e-ʿinān.

شرح المجلة:

إذا فقد شرط من الشروط المذكورة في ہذا الفصل على الوجہ المار تنقلب المفاوضة عناناً، مثلاً إذا دخل إلى يد واحد من المفاوضين في شركة الأموال مال بالإرث أو بطريق الهبة، فإذا كان يصلح رأس مال للشركة كالنقود تنقلب المفاوضة عناناً لكن إذا كان الزائد على رأس المال لا يصح رأس المال كالعروض والعقار فلا يضر بالمفاوضة. (شرح المجلة لمحمد خالد الاتاسی، ٤/٢٩٠، المادة: ١٣٦٢)

وفى الهندية عن السراجية: لو استفاد أحد المتفاوضين ما لا يجوز عليہ عقد الشركة بإرث أو ہبة أو وصية أو نحو ذلک ووصل إليہ، بطلت المفاوضة وصارت شركتہما عناناً. (شرح المجلة للاتاسی: ٤/٢٨٧)

الدر المختار:

وكل موضع لم تصح المفاوضة لفقد شرطہا ولا يشترط ذلک فی العنان كان عناناً كما مر لاستجماع شرائطہ. وفي رد المحتار: قولہ لاستجماع شرائطہ أی شرائط العنان. (الدر المختار مع رد المحتار: ٤/٤٩٩، سعيد)

و للاستزادة انظر: (البحر الرائق: ٥/١٧١، كوئتہ. فتح القدير: ٦/١٦٤، دار الفكر. والفتاوى الهندية: ٢/٣١١)

Allāh taʿālā knows best.

Partnership in goods

Question

Instead of cash, partners put in goods into the partnership. For example, Zayd has garments while ʿUmar has books. They agree on a fifty/fifty partnership. Is this permissible?

Answer

The jurists say that the wealth which partners invest in shirkat-e-mufāwadah and shirkat-e-ʿinān will have to be cash. For example, gold, silver or common currencies. Partnership in goods will not be permissible.

كون رأس المال من قبيل النقود شرط لصحة شركة الأموال سواء كانت مفاوضة أو عناناً فلا تجوز بالعروض والمكيل والموزون عندنا، لأنه يودي إلى ربح ما لم يضمن لأنه إذا باع كل واحد منهما رأس ماله وتفاضل الثمنان، فما يستحقه أحدهما من الزيادة في مال صاحبه ربح ما لم يملك وما لم يضمن. (شرح المجلة، للاتاسى، ٤/٢٦١، المادة: ١٣٣٨)

However, Hadrat Maulānā Zafar Ahmad ʿUthmānī rahimahullāh issued the fatwā of permissibility for shirkat fī al-ʿurūd (partnership in goods) in his *Imdād al-Ahkām*. Due to common challenges, the fatwā is issued on the opinion of other Imāms, and the verdict of permissibility is given for partnership in goods.[1]

Hadrat Hakīmul Ummat Maulānā Ashraf ʿAlī Thānwī rahimahullāh states in *Imdād al-Fatāwā* that although the jurists differ on the issue of partnership in goods, bearing in mind current needs and common challenges, the verdict can be issue on the madh-hab of Imām Mālik rahimahullāh. The difficulties and challenges of the modern age are more likely to be solved from it.[2]

Further reading: *Imdād al-Fatāwā*, vol. 3, p. 495.

Allāh taʿālā knows best.

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[1] *Imdād al-Ahkām*, vol. 3, p. 445.

[2] *Shirkat Aur Mudārabat ʿAsr Hādir Mei*, p. 254.

Partnership between spouses

Question

سوال: ما رأيكم فى الزوجة والزوج عقدا شركة بالتراضي عند عقد الزواج على أن ما حصلا وما سيحصلان فى المستقبل من جميع أنواع المال ونماءه فهو بينهما نصفان هل يجوز هذه الشركة أم لا؟

Answer

الجواب: الشركة فيما عندهما من الأمتعة الموجودة تصح بحيلة وتدبير ذكرها الفقهاء الكرام وهو أن يبيع كل واحد منهما نصف ماله بنصف مال الآخر وإن تفاوت قيمتهما حتى يصير المال بينهما نصفين فيكون رأس المال والربح والوضيعة بينهما نصفين كما يفهم من رد المحتار: للعلامة الشامى: (٤/٥٠٣، سعيد)

لكن يتحقق شركة المفاوضة بشرائط يشكل تحققها في أكثر المواقع فإن لها شرائط: (١)كونهما حرين عاقلين. (٢) المساواة في قدر رأس المال قدراً. (٣) دخول جميع ما يصح فيه الشركة من الأموال فى الشركة. (٤)المساواة فى الربح. (٥) العموم أى كونها في جميع التجارات. (٦) استعمال لفظ المفاوضة - هذا محصل ما فى البدائع: (٦/٩٢، سعيد)

ثم قلما توجد هذه الشرائط فلو عقدا شركة المفاوضة ولم توجد الشرائط تصير الشركة شركة عنان كما فى المجلة: إذا فقد شرط من شروط المفاوضة تنقلب المفاوضة عناناً - مجله ومعين القضاة والمفتين: (ص١٠١)

وإذا انعقدت الشركة عناناً فلها صور أربع:

(١) الشركة مع تساوى المال وعمل كل واحد مع تقسيم الربح متساوياً.

(٢) تقسيم الربح متفاوتاً مع عملهما كثلثي الربح لأحدهما وهذا أيضاً يصح.

(٣) أن يعمل أحدهما دون الآخر وشرطا الحصة الزائدة للعامل فهذا أيضاً صحيح قال ملك العلماء فى بدائع الصنائع: (٦/٩٥، سعيد) وإن شرطا العمل على الذي شرطا له فضل الربح جاز والربح بينهما على الشرط فيستحق ربح رأس ماله بماله والفضل بعمله وإن شرطا على أقلهما ربحاً لم يجز لأن الذي شرطا له الزيادة ليس له فى الزيادة مال ولا عمل ولا ضمان.

(٤) أن يعمل أحدهما وشرطا الحصة الزائدة لغير العامل فهذا لا يصح كما صرحت به عبارة الكاساني - ثم الشركة فيما سيحصلان من المال مما لا يكون من التجارة السابقة كالمال الموهوب أو الموروث لا يدخل فى الشركة السابقة إلا بعقد جديد مثلاً انعقدت بينهما شركة بحيث أن لكل واحد منهما عشرة آلاف دولار والربح متساوٍ ثم حصل للزوجة خمسة آلاف دولار من وراثة أبيها وأرادت إلحاقها فى التجارة المشتركة فلها أن تقول برضاء الزوج وقبوله أن لي ثلاثة أخماس من الربح ولك خمسان من الربح ويمكن أن تقول: إني ألحق مالي بالتجارة على أن لي النصف حسب ما سبق ولك النصف.

كما فى الفتاوى الهندية: ولو شرطا العمل عليهما جميعاً صحت الشركة وإن قل رأس مال أحدهما وكثر مال الآخر واشترطا الربح بينهما على السواء أو على التفاضل فإن الربح بينهما على الشرط. (الفتاوى الهندية ٢/٣٢٠)

نعم لو تعاهدا في بدء التجارة أن كل ما نحصله فهو بيننا كما قلنا وتعاهدنا ثم ما حصله كل واحد منهما وأدخله فى التجارة حسبما قالا وقررا يكون صحيحاً كبيع التعاطى، ويكون الربح بينهما كما قرر عند أول العقد. والله أعلم.

Imposing a penalty on one partner

Question

A few individuals entered into a partnership and suffered some losses. Will the loss be borne by the partner who did the work or will it be borne by all of them?

Answer

The jurists say that it is permissible to lay down the condition of less/more as regards profits. However, when a loss is suffered, the liability will be distributed equally among all the partners. For example, five individuals invested R1 000.00 each and entered into a partnership. Incidentally, they suffered a loss of R1 000.00. It is not permissible to make only one person liable. Rather, each partner will be liable to pay R200.00.

مطلب اشتراط الربح متفاوتاً صحيح، بخلاف اشتراط الخسران، قال: فما كان من ربح فهو بينهما على قدر رؤوس أموالهما، وما كان من وضيعة أو تبعة فكذلك، والخلاف أن اشتراط الوضيعة بخلاف قدر رأس المال باطل واشتراط الربح متفاوتاً عندنا صحيح. (فتاوى الشامى: ٤/٣٠٥، سعيد)

Allāh ta'ālā knows best.

When one partner provides essential items

Question

A few individuals invested R100.00 each with the intention of a partnership. One person spent R80.00 to purchase essential items and gave R20.00 in cash. Is his partnership valid? Or does he have to give the full cash amount of R100.00?

Answer

The jurists say that for a partnership to be valid, it is necessary to have cash. The partnership of the one who spent money to buy essential items is therefore invalid.

الهداية:

ولا ينعقد الشركة إلا بالدراہم والدنانير والفلوس النافقة ...إلى قولہ إن العروض لا تصح رأس مال الشركة. (الہداية: ٢/٦٢٧)

المبسوط:

لا يصح أن يكون رأس مال أحدہما دراہم ورأس مال الآخر عروضاً في مفاوضة ولا عنان. (المبسوط للامام السرخسى: ١١/١٦١. وكذا فى الفتاوى الہندية: ٢/٣٠٦)

'Allāmah Shāmī rahimahullāh explains the following way for the validity of a partnership in goods. The person who provided the items should sell some of them to the other partners. If the partnership is formed after that, it will be valid and permissible.

فتاوىٰ الشامى:

(وصحت بعرض) ہو المتاع غير النقدين (إن باع كل منہما نصف عرضہ بنصف عرض الآخر ثم عقداہا) مفاوضة أو عناناً وہذه حيلة لصحتہا بالعروض، (قولہ إن باع كل منہما) لأنہ بالبيع صار بينہما شركة ملك حتى لا يجوز لأحدہما أن يتصرف في نصيب الآخر ثم بالعقد بعده صارت شركة عقد فيجوز لكل منہما التصرف زيلعي. (قولہ بنصف عرض الآخر) وكذا لو باعہ بالدراہم ثم عقد الشركة فى العرض الذي باعہ جاز أيضاً زيلعي، وبحر، وقولہ الذي باعہ يعنى الذي باع نصفہ بالدراہم. (فتاوى الشامى: ٤/٣١٠، سعيد)

However, bearing in mind the challenges and problems of our times, Hadrat Thānwī rahimahullāh and Hadrat Maulānā Zafar Ahmad 'Uthmānī rahimahullāh issued a verdict of permissibility based on the Mālikī madh-hab.[1]

Some details can be found before this.

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[1] *Imdād al-Fatāwā*, vol. 3, p. 495; *Imdād al-Ahkām*, vol. 3, p. 445.

Allāh ta'ālā knows best.

When the wife assists the husband without a contract

Question

The wife is working with her husband, and they accumulated a lot of wealth due to their efforts. However, they did not make any agreement. What will the wife receive in such a situation? What will the ruling be if the entire capital belonged to the husband and his wife merely assisted him?

Answer

If the wife works with her husband, but there is no partnership, employment, or any other agreement between them; and the two accumulate a lot of wealth through their collective efforts, then some 'ulamā' say that the wealth will belong to the husband while the wife will be classified as a voluntary worker.

However, other scholars say that the wife will have half the share of the entire wealth. Although there is no agreement, the wife's continuous work and efforts with her husband point to the fact that she will have a share in half the wealth. Therefore, she ought to be given this share. The jurists state this explicitly. Yes, there cannot be a shirkat-e-mufāwadah because for it to be applicable, a mufāwadah agreement is necessary. And this is absent here.

(قوله وما حصلاه معا فلهما نصفين ...الخ) يعني ثم خلطاه وباعاه، فيقسم الثمن على كيل أو وزن ما لكل منهما وإن لم يكن وزنياً ولا كيلياً قسم على قيمة ما كان لكل منهما، وإن لم يعرف مقدار ما كان لكل منهما صدق كل واحد منهما إلى النصف لأنهما استويا فى الاكتساب وكأن المكتسب في أيديهما، فالظاهر أنه بينهما نصفان، والظاهر يشهد له في ذلك، فيقبل قوله ولا يصدق على الزيادة على النصف إلا ببينة، لأنه يدعي خلاف الظاهر. فتح. تنبيه: يوخذ من هذا ما أفتى به فى الخيرية في زوج امرأة وابنها اجتمعا في دار واحدة وأخذ كل منهما يكتسب على حدة ويجمعان كسبهما ولا يعلم التفاوت ولا التساوى ولا التمييز، فأجاب بأنه بينهما سوية، وكذا لو اجتمع إخوة يعملون في تركة أبيهم ونما المال فهو بينهم سوية، ولو اختلفوا فى العمل

والرأي. وقدمنا أن ہذا ليس شركة مفاوضة ما لم يصرحا بلفظها أو بمقتضياتها مع استيفاء شروطها، ثم ہذا في غير الابن مع أبيہ، لما فى القنية: الأب وابنہ يكتسبان في صنعة واحدة ولم يكن لهما شيء فالكسب كلہ للأب، إن كان الابن في عيالہ لكونہ معيناً لہ ألا ترى لو غرس شجرة تكون للأب ثم ذكر خلافاً فى المرأة مع زوجها إذا اجتمع بعملهما أموال كثيرة، فقيل ہي للزوج وتكون المرأة معينة لہ، إلا إذا كان لها كسب على حدة فهو لها، وقيل بينهما نصفان. (فتاوى الشامى: ٤/٣٢٥، فصل فى الشركة الفاسدة، سعيد)

الدر المختار:

تقبل ثلاثة عملاً بلا عقد شركة فعملہ أحدہم فلہ ثلث الأجر ولا شيء للآخرين. وفي رد المحتار: قولہ ولا شيء للآخرين، لأنهم لما لم يكونوا شركاء كان على كل منهم ثلث العمل، لأن المستحق على كل منهم ثلثہ بثلث الأجر، فإذا عمل أحدہم الكل صار متطوعاً فى الثلثين فلا يستحق الأجر، ح عن البحر. وقال ابن وہبان: ہذا فى القضاء، أما فى الديانة فينبغي أن يوفيہ بقية الأجرة لأن الظاہر من حال العامل أنہ إنما عمل الجميع على الظن أن يعطيہ جميع الأجرة فلا ينبغي أن يخيب ظنہ. (الدر المختار مع رد المحتار: ٤/٣٢٩، سعيد)

درر الحكام فى شرح مجلة الاحكام:

وأما ديانة فيجب على المستاجر أن يدفع بقية الأجرة للعامل لأن الظاہر من حالة العامل أنہ قد قام بجميع العمل على أمل أن يدفع الأجرة فلا يليق أن يخيب ظنہ وأملہ ہذا ولا سيما أن الغالب الفقر في أحوال العمال. [طحطاوى]. (درر الحكام فى شرح مجلة الاحكام: ٣/٣٦٥). (وكذا فى شرح منظومة ابن وہبان: ١/٢٤٠ فصل من كتاب الشركة، الوقف المدنى)

الدر المختار:

وقال أبو يوسف: إذا كان الصانع معاملاً به فله الأجر، وإلا فلا، وقيل أى وقال محمد إن كان الصانع معروفاً بهذه الصنعة بالأجر وقيام حاله بها أى بهذه الصنعة كان بيمين القول قوله بشهادة الظاهر وإلا فلا، وبه يفتى. وفي رد المحتار: قوله بشهادة الظاهر لأنه لما فتح الدكان لأجله جرى ذلك مجرى التنصيص عليه اعتباراً لظاهر المعتاد، زيلعى. (الدر المختار مع رد المحتار: ٦/٧٥، كتاب الاجارة، سعيد)

To summarize: A lot of wealth has been accumulated through the efforts of the husband and wife. Husband and wife will be partners in the wealth and each will receive 50%. This arrangement will be similar to shirkat-e-sanā'i'. If the entire capital belonged to the husband and the wife was only assisting him, even then, she will be eligible for payment according to Ibn Wahbān and the annotator to *al-Majallah*. For example, a person takes his clothes to a washer-man or dyer and places them in front of him without saying anything to him. Obviously, he will have to pay him for his services. After all, the purpose of the shop is to earn money and a payment is specified.

Allāh taʿālā knows best.

Obtaining the value of a co-owned item

Question

Six people are partners in a plot of land. One of them wants to leave the partnership. This will require obtaining a value of the land so that he could be given his money according to his share. Who will bear the cost of obtaining the value of the land? Will the cost be distributed among the six or will the one person pay for it?

Answer

All the partners will bear the cost of obtaining the value of the land because there is benefit in it for all of them. Each person will learn the land's value. Just as all partners are equally liable for the payment for a distributor, the cost of obtaining a value of the land will be borne equally by all the partners.

الهداية:

(فإن لم يفعل نصب قاسماً يقسم بالأجر) معناه بأجر على المتقاسمين، لأن النفع لهم على الخصوص، ويقدر أجر مثله كي لا يتحكم بالزيادة، والأفضل أن يرزقه من بيت المال لأنه أرفق بالناس وأبعد عن التهمة. (الهداية: ٤/٤١١، كتاب القسمة)

مجمع الانهر:

فإن لم ينصب ينصب قاسماً يقسم بين الناس بأجر على المتقاسمين، لأن النفع لهم على الخصوص ...يقدر أى أجر المثل له أى للقاسم القاضي لئلا يطمع في أموالهم ويتحكم بالزيادة ثم أن الأجر هو أجر المثل وليس له قدر معين وقيل يقدر الأجر بربع العشر كالزكاة، لأنها عمل العامة فأشبه الزكاة كما في شرح الوقاية لابن الشيخ وهو أى أجر المثل على عدد الرؤوس أى رؤوس المتقاسمين عند الإمام، لأن تمييز الأقل من الأكثر كتمييز الأكثر من الأقل فى المشقة وعندهما على قدر السهام لأنه مؤنة الملك فيقدر بقدره وبه قال الشافعي وأحمد وأصبغ المالكي. (مجمع الانهر: ٢/٤٨٨)

Allāh taʿālā knows best.

Buying shares in a company which runs hotels

Question

A company is engaged in the construction and running of hotels. Some of the hotels sell alcohol and accommodate other immoral practices. However, about 90% or more of its business is from the hiring of hotel rooms. The company is not in debt. If shareholders encourage others to buy shares in this company, the former receive a percentage as a commission. Is it permissible to buy shares in such a company?

Answer

The major income of this company is from halāl sources. This is why there is room to buy shares from it. Yes, a shareholder must voice his disapproval of the evils in the company's annual meeting.

Islām Aur Jadīd Maʿāshī Masā'il:

1. The core business of the company is not in conflict with the Sharīʿah. For example, providing investment services on the basis of usury. In other words, shares in a bank, insurance company, or shares in a company which is involved in some other impermissible business. For example, companies which prepare or sell alcohol, pork, harām meat; or companies which are involved in gambling, night clubs, immorality, and so on. It is not permissible to buy shares in these companies and to do business with them.

2. If the core business of the company is halāl – e.g. sale of automobiles, textiles, etc. – but it deposits its extra capital in an interest-bearing account or takes loans on interest, then it is necessary for the shareholders to express their disapproval of such transactions. The best way of doing this is to raise one's voice against these transactions in the annual meeting of the company.

3. If the income of the company includes income from usurious transactions, then the shareholder must deduct that percentage from his dividends and give it in charity. The shareholder must not take any benefit from it. For example, if from the total profits of the company, five percent was derived from usurious accounts, the shareholder must give five percent of his dividends in charity.[1]

Allāh taʿālā knows best.

A Muslim becoming a partner in the manufacture of vinegar

Question

A Muslim and a non-Muslim are partners in a factory which makes vinegar. The manufacture of vinegar has to go through the stages of grape juice, wine, etc. This is not an issue for the non-Muslim, but the Muslim is concerned about the permissibility of such a business. Kindly explain.

Answer

Wine is not the objective; vinegar is. It is therefore permissible for a Muslim to be a partner in such a business. However, it is necessary that the wine is not consumed by anyone before the vinegar is made.

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[1] *Islām Aur Jadīd Maʿāshī Masā'il*, vol. 5, p. 164.

ولو أمسک الخمر في بيته للتخليل جاز ولا يأثم. (الفتاوى الهندية: ٥/٣٧٣، كتاب الكراهية، فى المتفرقات)

الهداية:

والمسلم يحمي خمر نفسه للتخليل. (الهداية: ١/١٩٨، كتاب الزكوٰة، باب فيمن يمر على العاشر)

البناية:

وللمسلم ولاية خمور نفسه حتى أن الذمي إذا سلم وله خمور كان له حفظها أو يحفظها غيره لتخللها أو يتخلل بنفسها. (البناية فى شرح الهداية: الجزء الثانى، ص ١٢٢٢)

فتح القدير:

قوله تبعاً للخمر دون العكس لأنها "أى الخمر" مالية لأنها قبل التخمر مال وبعده كذلك بتقدير التخلل. (فتح القدير: ٢/٢٣٠، باب فيمن يمر على العاشر، دار الفكر)

المحيط البرہانی:

ان الخمر كما يكون للشرب، وإنه معصية في حق المسلم، يكون للتخليل، وإنه مباح للكل. (المحيط البرہانی: ٩/١٩٠، الاستئجار على المعاصى)

When the grape juice turns into wine, it is by the way; it is not the objective.

كثير من الأشياء تثبت ضمناً لا تثبت قصداً.

If a person observes iʿtikāf in a masjid, he sleeps there. But this sleep is not the objective; worship is the objective. This is why it is not makrūh. In fact, he will be rewarded. The jurists mention the following principle:

يغتفر فى التابع ما لايغتفر في غيرها. (قواعد الفقه، ص ١٤٢)

Sharh al-Majallah:

If a person takes an oath that he will not buy wool, and he then buys a sheep, he will not have broken his oath because the purchase of the wool is by the way, and subservient to the purchase of the sheep.[1]

A person takes an oath that he will not buy bricks or timber. He then buys a house. His oath is not broken because the bricks and timber came by the way.[2]

Muhammad Khālid Atāsī gives several examples of this nature in *Sharh al-Majallah.*

Allāh taʿālā knows best.

Few rules related to partnership

Question

A person sold all his properties and businesses to his four sons. After obtaining these and taking control of them, the four sons formed a business partnership. They compiled a formal partnership agreement to run an official partnership business. The agreement is attached to this letter for your perusal. I have the following questions. I hope you will provide a detailed answer.

1. Is the attached partnership agreement valid in the Sharīʿah?

2. If a partner acts in conflict with the agreement, will his action be deemed to be in conflict with the Sharīʿah?

3. If the exact capital amount is not mentioned in the agreement but is mentioned in the annual report, will the partnership be valid?

4. If a partner gives up work in line with the agreement – while it is a condition of the agreement for him to work – and goes away to some place and remains absent for fifteen years – will such an absent partner be considered to be a partner in the partnership? Does his partnership terminate because of his absence?

5. A partner resigns from the partnership but the remaining partners do not reply to his resignation. Is his resignation considered in the Sharīʿah?

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[1] *Sharh al-Majallah*, vol. 1, p. 132.

[2] Ibid.

6. It is stated in the partnership agreement that if a partner hands in a written resignation, his partnership will automatically terminate six months from the date of the resignation. Will his partnership terminate according to this?

7. If a partner resigns as described above, and the remaining partners continue giving him his share of the profits at the time of distribution, does his partnership continue or will it be considered to have terminated?

8. A partner wrote his resignation but no one knows about it. Later on, they came across it without anyone giving it to them. Will this resignation be valid?

9. A partner presents his resignation against a specific condition of the agreement to the remaining partners, will it be valid?

10. When one partner passed away, his children were invited to a meeting to include them in the partnership. Some of the heirs expressed their approval while others remained silent. Will all the heirs be considered to be part of the partnership?

This query was sent from a South African family to several Dār al-Iftās. We also received these questions, and they were sent to Dār al-ʿUlūm Karachi. We received the answers from there and the same answers were also printed in *Fatāwā ʿUthmānī.* The answers from Dār al-ʿUlūm Karachi were short and comprehensive. Our Dār al-Iftā considered these answers to be most enlightening.

Answer

(1)

The partnership is valid. Although a shirkat-e-ʿurūḏ is not valid in the Ḫanafī madh-hab, because the person's sons bought the entire estate collectively from their father, partnership in ownership (shirkat al-milk) has been established. After shirkat al-milk is realized, a partnership in goods is also valid.

لما فى الهندية: والحيلة في جواز الشركة فى العروض وكل ما يتعين بالتعيين أن يبيع كل واحد منهما نصف ماله بنصف مال صاحبه حتى يصير مال كل واحد منهما نصفين، وتحصل شركة ملك بينهما، ثم يعقدان بعد ذلك عقد الشركة فيجوز بلا خلاف كذا فى البدائع. (الفتاوى الهندية: ٢/٣٠٧، باب اول، فصل ٣)

There is no longer an objection to the validity of the partnership in goods.

As for the partnership agreement which is attached to this query, most of its conditions are valid but some are invalid. For example, no partner may enter into a separate business venture; neither directly nor indirectly. This is conflict with the demand of shirkat-e-ʿinān. And the conditions of shirkat-e-mufāwaḏah are not present here. This condition is therefore invalid. Nonetheless, if an invalid condition is laid down, it does not invalidate the partnership. Rather, only that condition is invalid and it is not binding on a person to practise on it.

لما في رد المحتار: لأن الشركة لا تفسد بالشروط الفاسدة. (فتاوى الشامى: ٤/٣١٦، ط: سعيد)

Another invalid condition in the agreement states that if a partner passes away, then whatever months have passed until the 30th of June, his children will receive twenty-five pounds for each of those months together with the value of the business shares. It is stated in the agreement – which is written in English – that these twenty-five pounds will take the place of the profit which came into the deceased's share from the 30th of June to the date of his demise.

A similar invalid condition states that if a partner terminates his partnership on 31 December, he will be eligible for that amount which was his share until the 30th of June, together with one hundred and fifty pounds which will be considered to be his share of the profit from 30 June to 31 December. This condition is also invalid due to the previously-mentioned reason. If a certain amount as profit was specified from the original partnership, then the entire partnership would have been invalidated.

لما فى الدر المختار: وتفسد باشتراط دراهم مسماة من الربح لأحدهما لقطع الشركة لا لأنه شرط، لعدم فسادها بالشروط. (الدر المختار مع فتاوى الشامى: ٤/٣١٦، سعيد)

However, because clause number five of the same agreement contains a general distribution of the profits according to the Sharīʿah, and instead of specifying a certain amount for a partner, profits and losses are to be distributed on a percentage basis – and the fundamental partnership agreement is based on this clause – and the manner laid out in clauses eleven and twelve is in conflict with clause number five,

and a system has been laid down only when the partnership is cancelled, in fact, according to the English text, a specified amount is put in place of the profit, which then means that the profit will be what is specified in clause number five, but this specific amount will be considered to be in place of the other; this is why the entire partnership agreement will not be invalidated because of this invalid condition. Rather, this condition will be invalid.

To summarize: The document which is attached to the partnership agreement is valid according to the Sharīʿah to the extent that the partnership is valid on its foundation. However, it is not binding to practise on the invalid conditions which are mentioned in it and which were referred to above.

(2)

It is not permissible for any partner to act against any of the conditions of the agreement which are valid according to the Sharīʿah.

لأن المسلمين على شروطهم إلا شرطاً حرم حلالاً أو أحل حراماً. (صحيح البخارى)

(3)

If the whereabouts and nature of the properties which the brothers bought from their father are known with certainty or it was written down somewhere, then it was not necessary to write the minor details and amounts in the partnership agreement for the validity of the partnership. There are two reasons for this:

1. Specifying the capital amount of the partnership at the time of making the agreement is not a prerequisite for the validity of the agreement.

لما فى البدائع: وأما العلم بمقدار رأس المال وقت العقد فليس بشرط لجواز الشركة بالأموال عندنا وعند الشافعى شرط ...ولنا أن الجهالة لا تمنع جواز العقد لعينها، بل لافضائها إلى المنازعة وجهالة رأس المال وقت العقد لا تفضي إلى المنازعة، لأنه يعلم مقداره ظاهراً وغالباً لأن الدراهم والدنانير توزنان وقت الشراء فيعلم مقدارها فلا يؤدي إلى جهالة مقدار الربح وقت القسمة. (بدائع الصنائع: ٦/٦٣، سعيد)

2. In the present case, shirkat-e-milk had been established among the brothers before shirkat-e-ʿinān. This was mentioned in the answer to the first question. Furthermore, the shares of all were equal and so was the profit. Therefore, there was no fear of ignorance of the amount causing a dispute. As for the circumvention for shirkat fī al-ʿurūd which was mentioned in the answer to the first question, ʿAllāmah Ibn Humām rahimahullāh writes with reference to it:

وهذا لأن المانع من كون رأس مال الشركة عروضاً كل من أمرين: لزوم ربح ما لم يضمن، وجهالة رأس مال كل منهما عند القسمة، وكل منهما منتف، فيكون كل ما ربحه أحدهما ما هو مضمون عليه، ولا تحصل جهالة في رأس مال كل منهما، لأنه لا يحتاج إلى تعرف رأس مال كل منهما عند القسمة حتى يكون ذلك بالحذر فتقع الجهالة لأنهما مستويان فى المال شريكان فيه فبالضرورة يكون كل ما يحصل من الثمن بينهما نصفان. (فتح القدير: ٥/٣٩٦)

(4)

A partnership does not terminate merely by the absence of a partner or his leaving his work.

لما فى الهندية: وإن عمل أحدهما ولم يعمل الآخر بعذر أو بغير عذر صار كعملهما معاً، كذا فى المضمرات. (الفتاوى الهندية: ٢/٣٢٠، كتاب الشركة، باب ٣، فصل ٢)

If the other partners were not happy with his leaving the work, they should have cancelled the partnership with him explicitly.

(5)

To execute a one-sided cancellation of a partnership, the Sharīʿah does not require the other party to accept the cancellation.

لما فى الدر المختار: وتبطل أيضاً بإنكارها وبقوله لا أعمل معك وبفسخ أحدهما. (شامى: ٤/٣٢٧، سعيد)

The agreement which is made in the present partnership does not make the effectiveness of the resignation to be dependent on the

acceptance of the other partners. Therefore, if a partner handed in a resignation in line with the agreement, his partnership will be considered to have terminated in the time period which is stated in the agreement. This is irrespective of whether the other partners accepted the resignation or not.

(6)

The partnership will terminate. The proof was given in the answer to question five.

(7)

It was stated above that as per the agreement, the partnership of the one who tended in his resignation has terminated. A new agreement will have to be made to reinstate him as a partner. Therefore, if the other partners clearly re-established a partnership with him either in writing or verbally – and continued giving a fourth of his share based on this renewed partnership – he will be considered to be a partner once again. If not, he will not be a partner.

On the other hand, if a new agreement was not made with him and the other partners merely continued giving him a fourth share, then there could be several possibilities. (1) The other partners gave him this amount voluntarily as a donation. (2) Because the partnership was terminated, the shares which the other partners had to give to the partner who resigned were given to him as though they were his shares. Therefore, as long as a new and explicit partnership agreement is not made – in the presence of these possibilities – the payment of the fourth share cannot be classified as a partnership agreement. This is because a partnership cannot be established on the basis of possibilities.

(8)

Even the Sharī'ah makes it mandatory for a partner who terminates his partnership to inform the other partners of the termination. The partnership does not terminate without informing them.

لما فى الدر المختار: وتبطل أيضاً بإنكارها...وبفسخ أحدهما...ويتوقف على علم الآخر لأنه عزل قصدي، وفي رد المحتار: قوله لأنه عزل قصدي لأنه نوع حجر فيشترط علمه دفعاً للضررعنه، فتح. (الدر المختار مع رد المحتار: ٤/٣٢٧، سعيد)

The attached agreement also states that it is necessary to present a resignation to the other partners. If a partner wrote a note of resignation and kept it with him without presenting it to any of the other partners, his partnership will not be considered to have terminated. Yes, when he takes out the resignation and presents it to the other partners, the partnership will terminate six months from the date of presenting it.

(9)

This question is unclear. What is the nature of presenting a resignation in conflict with a specific clause of the agreement? If it is written with clarity, it will be possible for us to give an answer.

(10)

We haven't come across this clause explicitly. However, based on our assessment of the other clauses, it becomes clear that in this case, the children of the deceased partner will be considered to be part of the business. The fundamental rule is that the partnership terminated with the death of the partner. It now becomes the duty of the other partners to give the share of the deceased partner to his children. If you want to keep them [children] as partners, it will be necessary to obtain the approval of all the partners.

لما فی الدر المختار: لا يملک الشريک الشركة إلا بإذن شريكه، جوہرة. (الدر المختار: ٤/٣١٧، سعيد)

In normal situations, this approval has to be stated explicitly and clearly.

لأن الساكت لا ينسب إليه قول. (شامی: ٣/٦٢، سعيد. والاشباه: ٢/٣٨٢، القاعدة الثانية عشر، ادارة القرآن)

However, when two partners had a meeting for this very purpose and decided to make the deceased partner's children partners in the business, this decision has been taken on behalf of all partners. One partner remained silent despite being present and did not make any objection. After that, the children of the deceased continued acting as partners in the business. Even then, he did not make any objection. When his response is observed collectively, it is sufficient proof of his acceptance.

نظيره ما فى الأشباه: سكوته عند بيع زوجته أو قريبه عقاراً إقرار بأنه ليس له، على ما أفتى به مشايخ سمرقند ...وفيه بعد ذلك رآه يبيع أرضاً أو داراً فتصرف فيه المشتري زماناً وهو ساكت يسقط دعواه.

فيه عما قبله زيادة تصرف المشتري بعد الشراء زماناً وهو ساكت فهو قيد فى الأجنبي لا فى الزوجة والقريب كما يفهمه إطلاقه. (شرح الاشباه والنظائر: ١/٣٨٧، القاعدة الثانية عشر، ادارة القرآن)

The above rulings together with the partnership agreement and its clauses are to be found in *Fatāwā ʿUthmānī*, vol. 3, pp. 57-71. We received the answers to these questions from several dār al-iftās, e.g. Dār al-Iftā Dār al-ʿUlūm Karachi, Dār al-Iftā Dār al-ʿUlūm Deoband, and answers from Hadrat Muftī Sayyid ʿAbd ar-Rahīm Sāhib rahimahullāh of Rānder. We expressed our concurrence with them. However, only the answers of Dār al-Iftā Dār al-ʿUlūm Karachi have been quoted for the sake of brevity.

Allāh taʿālā knows best.

THE RIGHT OF PRE-EMPTION

The issue of shuf'ah when there are three partners to a plot of land

Question

Three brothers are partners to a plot of land. They are Abū Bakr, ʿImrān and Safwān. ʿAbū Bakr sold his share to ʿImrān. Can Safwān make a claim of shufʿah? If he can, then for how many shares?

Answer

Safwān can make a claim of shufʿah. He can take half the share of Abū Bakr. The other half will remain with ʿImrān.

الدر المختار:

ويملک بالأخذ بالتراضي أو بقضاء القاضي بقدر رؤوس الشفعاء لا الملک. وفي فتاوى الشامى: (قوله بقدر رؤوس الشفعاء)... وشمل ما لو كان المشتري أحدهم وطلب معهم فيحسب واحداً منهم ويقسم المبيع بينهم كما فى الوہبانية وشروحها. (الدر المختار مع رد المحتار: ٦/٢١٩، كتاب الشفعة، سعيد)

درر الحكام:

صورته دار بين ثلاثة وللدار جار ملاصق فإذا بيعت الدار واشتراها أحد الشركاء تثبت الشفعة للمشتري سواء اشترى إصالة أو وكالة ...وتثبت أيضاً للشريک الآخر وفائدته أنها لا تثبت للجار لأن الشريک مقدم عليه. (درر الحكام شرح غرر الاحكام: ٢/٢١٤)

الدر المختار:

وتثبت لمن شرى إصالة أو وكالة أو اشترى له بالوكالة، وفائدته أنه لو كان المشتري أو الموكل بالشراء شريکاً وللدار شريک آخر فلهما الشفعة، وقال الشامي: وفى القنية: اشترى الجار داراً ولها جار آخر فطلب الشفعة وكذا

المشتري فهي بينهما نصفين لأنهما شفيعان، قال ابن الشحنة:...وعلى هذا لو جاء ثالث قسمت أثلاثاً أو رابع فأرباعاً. (الدر المختارمع فتاوى الشامى: ٦/٢٣٩، كتاب الشفعة، سعيد)

وللاستزادة انظر: (درر الحكام شرح مجلة الاحكام: ٢/٦٧٨، المادة: ١٠٠٨. وامداد الفتاوىٰ: ٣/٤٣١)

Allāh taʿālā knows best.

Shuf'ah on waqf land

Question

A plot of land which is next to a madrasah is on sale. Can the principal of the madrasah make a claim of shufʿah for that plot of land?

Answer

There is no right of shufʿah for waqf land. Neither the endower nor the trustee can make a claim of shufʿah on behalf of the waqf land. In order for the right of shufʿah to be established, there has to be an owner of the land; and waqf land has no owner.

(ولا شفعة فى الوقف) ولا له، نوازل (ولا بجواره) وفى الشامية: قوله ولا شفعة فى الوقف، اى اذا بيع قال فى التجريد: ما لا يجوز بيعه من العقار كالاوقاف لا شفعة فى شيء من ذلك عند من يرى جواز بيع الوقف ...وقوله ولا له أى لا لقيمه ولا للموقوف عليه لعدم الملك. (الدر المختار مع رد المحتار: ٦/٢٢٣، كتاب الشفعة، سعيد)

حاشية الطحطاوى:

قوله ولا له أى إذا بيعت دار بجنب دار الوقف فلا شفعة للواقف ولا يأخذها المتولي ولا الموقوف عليه أفاده فى الهندية. (حاشية الطحطاوى على الدر المختار: ٤/١٢١)

Allāh taʿālā knows best.

Shuf'ah when a house has two neighbours

<u>Question</u>

A house has two neighbours. The owner of the house sold it to one of the neighbours. Can the other neighbour make a claim of shufʿah?

<u>Answer</u>

If two neighbours make a claim of shufʿah, the house will be divided into three – between the buyer and the two shufʿah claimants. If there is one neighbour, the house will be divided in two.

<u>الفتاوى الهندية:</u>

ولو أن رجلاً اشترى داراً وهو شفيعها ثم جاءه شفيع مثله قضى القاضي بنصفها. (الفتاوى الهندية: ٥/١٧٨)

<u>فتاوىٰ الشامى:</u>

قوله ثم لجار ملاصق، ولو متعدداً، والملاصق من جانب واحد ولو بشبر كالملاصق من ثلاثة جوانب فهما سواء. (فتاوى الشامى: ٦/٢٢١، سعيد)

Allāh knows best.

TRANSLATOR'S NOTE

All praise is due to Allāh taʿālā translation of the fifth volume of *Fatāwā Dār al-ʿUlūm Zakarīyyā* was completed on 28 Dhū al-Hijjah 1443 A.H./28 July 2022. We pray to Allāh taʿālā to accept this humble effort and to make it a source of our salvation in this world and the Hereafter.

رَبَّنَا تَقَبَّلْ مِنَّا اِنَّكَ اَنْتَ السَّمِيْعُ الْعَلِيْمُ، وَتُبْ عَلَيْنَا اِنَّكَ اَنْتَ التَّوَّابُ الرَّحِيْمُ

As with all human endeavours, there are bound to be errors, mistakes and slip-ups in the translation. I humbly request the reader to inform me of them so that they could be corrected in future editions. Constructive criticism and suggestions will be highly appreciated. I can be contacted via e-mail: maulanamahomedy@gmail.com

Was salām
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GLOSSARY

Note: The explanations or definitions given below are meant to merely facilitate an understanding of the words used in the book. They are, by no means, full definitions. Consult the ʿulamā' for detailed explanations.

Ajīr-e-khās: A hireling who is hired by one person or for one specific task.

Ajīr-e-mushtarak: A co-partnered hireling or a hireling who does two or more tasks.

Amānat: Something which is given as a trust.

Amīn: The person to whom the item is entrusted.

ʿAqd-e-damān: Contract of guarantee.

ʿAqd-e-muʿāwadah: An agreement or transaction in which there is an exchange of goods, money or services.

ʿAqd-e-muwālāt: Agreement of patronage.

ʿAqd-e-tabarruʿ: An agreement containing a voluntary donation or assistance. For example, an interest-free loan.

Bayʿ at-tawliyah: Resale at cost price.

Dār al-ʿahd: A country which has entered into a covenant with Muslims.

Dār al-amn: A country which is ruled by non-Muslims but Muslims are free to practise their religion. They can invite towards Islam and practise those injunctions of Islam which do not require political rule and political authority.

Dār al-harb: A country belonging to non-Muslims where unbelievers enjoy peace and security while Muslim residents are deprived of peace and security. Furthermore, the Muslims are denied religious rights such as performing acts of worship, jumuʿah salāh, the two ʿīd salāhs, etc. openly.

Dār al-Islām: A country in which Muslims have the political authority to promulgate and apply all the injunctions of Islam.

Dhimmī: A non-Muslim living in a Muslim country and given a guarantee over his life and wealth.

Harbī: A person living in dār al-harb.

Hibah al-mushāʿ: A grant/gift which is indivisible or undividable.

Hīlah tamlīk: Circumvention for the sake of ownership.

Ijārah al-mushāʿ: A rental contract with respect to something which is indivisible or undividable.

Kafīl: A guarantor.

Kāfir harbī: An unbeliever residing in a dār al-harb.

Luqtah: A lost item which has been found by someone.

Majhūl (narrator): A narrator who is unknown. Nothing is known about him or his honesty.

Makrūh tahrīmī: An impermissible sinful act close to harām.

Makrūh tanzīhī: An undesirable act though not sinful.

Maʿlūl (narration): A Hadīth which looks authentic outwardly but contains a hidden damaging defect.

Mudārab: The partner in a mudārabah agreement who undertakes to do the work.

Mursal Hadīth: When the one who narrates the Hadīth is not a Sahābī but a Tābiʿī.

Muslim harbī: A person who embraces Islam in a dār al-harb.

Muslim musta’man: A Muslim who is guaranteed peace in a non-Muslim country.

Nisāb: The minimum amount of wealth which causes zakāh to become obligatory on a person.

Qafīz at-tahhān: Giving a certain portion of the flour to the person who pounds the grain into flour.

Ribā al-fadl: Exchange or sale transactions in trade which result in the charging of interest through the exchange of the same commodity, but of a different quality or quantity.

Ribā an-nasī'ah: Interest on loans.

Sāʿ: A weight equal to about 3kgs.

Sāhib-e-nisāb: A person who owns the minimum amount of money or wealth which makes zakāh obligatory on him.

Shirkat-e-ʿinān: Where equality in capital, management or liability might be equal in one case but not in all respects. Meaning either profit is equal but not labour, or vice versa.

Shirkat-e-mufāwadah: Mufāwadāh refers to each person handing himself over to the other. This partnership is known as mufāwadah because each partner hands over his wealth to the other.

Shirkat-e-milk: Joint ownership of two or more persons in a property.

Shirkat al-ʿurūd: Partnership on the basis of goods.

Tabarruʿ mashrūt: Laying down a condition in a favour, or laying down a condition for one's own benefit in a transaction.

Tadmīn as-sāʿī: Liability to be paid by the one doing the work.

Tadmīn ajīr mushtarak: Liability to be paid by an ajīr mushtarak.

Takhliyah: When the buyer is given the power to come and take possession of the item whenever he wants.

Talāq-e-bā'in: An irrevocable divorce.

Taʿlīq at-tamlīk ʿalā al-khatar: Suspending ownership to an event which could or could not occur.

Ta'mīn al-mas'ūlīyyah: Protecting one's self against liability.

Taʿwīdh: An amulet tied around the arm or suspended from the neck.

Tawliyah: See bayʿ at-tawliyah.

Wadīʿat: Something entrusted to someone's custody.

Wājib at-tamlīk: That which is obligatory to give in ownership.

Wājib at-taṣadduq: That which is obligatory to give in charity.

Walā'-e-muwālāt: Agreement of patronage.

Walīmah: A meal presented after a marriage by the groom and his family.